No. 563

Court of Appeals

of the State of New York

In the Matter of the Arbitration
of Certain Differences between

IIDA & CO., NEW YORK, INC.,

Petitioner-Respondent,

and

DEVIDAYAL (SALES) LTD.,

Respondent-Appellant.

ABRIDGED RECORD ON APPEAL

ARNOLD D. NAIDICH,
Attorneys for Respondent-Appellant,
130 West 42nd Street,
Borough of Manhattan,
New York 36, N. Y.,
BR 9-7557.

BUCHTER, RATHHEIM, ABRAMS & HOFFMAN,
Attorneys for Petitioner-Respondent,
61 Broadway,
Borough of Manhattan,
New York 6, N. Y.,
WH 3-3100.

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Supreme Court

OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of the Arbitration of certain differences between

IDA & CO. NEW YORK, INC., Petitioner-Respondent,

and

DEVIDAYAL (SALES) LTD., Respondent-Appellant.

Statement Under Rule 234

This is an appeal (a) from a resettled order of Mr. Justice Thomas A. Aurelio dated November 29, 1955, granting petitioner-respondent's motion to confirm the award of the arbitrator, William A. Hyman, denying respondent-appellant's cross-motion to deny or modify said award and (b) from a judgment in favor of the petitioner-respondent and against respondent-appellant in the sum of $54,838.46.

A notice of appeal from each and every part of said order and judgment was filed on November 29, 1955. On January 3, 1956, respondent-appellant filed an affidavit in the County Clerk's office limiting its appeal solely to the question of damages.

A proceeding was commenced by the service of an order to show cause dated February 14, 1955, for an order directing an arbitration of the dis-

putes between the parties and the appointment of an arbitrator by the court. Thereafter the court duly appointed William A. Hyman, Esq., as arbitrator. Hearings were held before the arbitrator in June and July, 1955, and the arbitrator made an award dated September 28, 1955, in favor of the petitioner. A motion was made by the petitioner to confirm the award, and a cross-motion was made by the respondent to modify the award and for other relief. Mr. Justice Aurelio granted the petitioner's motion to confirm the award, and thereafter on November 2, 1955, judgment for
5 $54,838.46 was entered in favor of the petitioner pursuant to said order.

The names of the parties are given in full above, and there has been no change of parties since the commencement of the within proceeding.

Petitioner-respondent appears by Buchter, Rathheim, Abrams & Hoffman, Esqs., 61 Broadway, New York 6, New York.

Respondent-appellant originally appeared by Schwartz & Naidich, Esqs., 130 West 42nd Street, New York 36, N. Y. On March 28, 1956 a stipulation substituting Lehman, Goldmark & Rohrlich, Esqs., of 20 P[illegible]e Street, New York, N. Y., was
6 filed in the office of the Clerk of the County of New York. Respondent-appellant is now represented on this appeal by Arnold D. Naidich, Esq.

7

Notice of Appeal.

SUPREME COURT

OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

In the Matter of the Arbitration of certain differences between

IIDA & Co. NEW YORK, INC.,
Petitioner-Respondent,

and

DEVIDAYAL (SALES) LTD.,
Respondent-Appellant.

8

Sirs:

PLEASE TAKE NOTICE that the respondent, Devidayal (Sales) Ltd., hereby appeals to the Appellate Division of the New York Supreme Court in and for the First Judicial Department, from the re-settled order entered in the above entitled proceeding in the office of the Clerk of the County of New York on the 29th day of November, 1955, granting petitioner's motion to confirm the award of the Arbitrator in the above entitled proceeding and denying the respondent's cross-motion to deny or modify said award, and from the judgment entered in the office of the Clerk of the County of New York on the 2nd day of November, 1955 in favor of the above named petitioner and against the above named respondent for the sum of $54.-

9

838.46, and that respondent appeals from each and every part of said order and judgment.

Dated: New York, November 29, 1955.

Yours &c.,

SCHWARTZ & NAIDICH,
Attorneys for Respondent,
Office & P. O. Address,
130 West 42nd Street,
New York 36, N. Y.

To:

CLERK OF THE COUNTY OF NEW YORK.

BUCHTER, RATHHEIM, ABRAMS & HOFFMAN, Esqs.,
Attorneys for Petitioner,
61 Broadway,
New York 6, N. Y.

Resettled Order Confirming Arbitration Award, Appealed From.

At a Special Term Part I of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse, Pearl and Centre Street, on the 28 day of November, 1955.

Present: Hon. Thomas A. Aurelio, *Justice.*

In the Matter of the Arbitration of certain differences between
Iida & Co. New York, Inc.
and
Devidayal (Sales) Ltd.

Upon reading and filing the annexed stipulation dated November 23, 1955, it is

Ordered, that the order heretofore made and entered herein on the 28th day of October, 1955, be resettled, so as to read as follows:

"At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse, Pearl and Centre Streets, on the 28th day of October, 1955.

Present: Hon. Thomas A. Aurelio, *Justice.*

In the Matter of the Arbitration of certain differences between
Iida & Co. New York, Inc.
and
Devidayal (Sales) Ltd.

Order Confirming Arbitration Award, and for Judgment Thereon

"A motion having been made by Iida & Co. New York, Inc. for a confirmation of the award of the

16 *Resettled Order Confirming Arbitration Award, Appealed From.*

arbitrator made in the above entitled proceeding, dated the 28th day of September, 1955, and filed in the New York County Clerk's office on the 28th day of September, 1955; and Devidayal (Sales) Ltd., the respondent above named, having made a cross-motion to deny or modify said award; and upon reading and filing the notice of motion on behalf of said Iida & Co. New York, Inc. for the confirmation of the said award dated the 30th day of September, 1955, together with the affidavit of Sidney Abrams, Esq., duly sworn to
17 the 30th day of September, 1955, and the award of the Arbitrator and the contract between the parties containing the arbitration agreement, and the stenographer's minutes of the hearings before the Arbitrator filed in the office of the Clerk of the County of New York on September 28, 1955, all submitted in support of said motion to confirm; and upon reading and filing the affidavit of Arnold D. Naidich, Esq., sworn to the 5th day of October, 1955, in opposition thereto; and upon reading and filing the notice of motion on behalf of Devidayal (Sales) Ltd. for an order denying or modifying said award, dated October 5, 1955, together with the affidavit of Arnold D. Naidich, Esq., sworn to October 5, 1955, and the stenog-
18 rapher's minutes of the hearings before the Arbitrator filed in the office of the Clerk of the County of New York on September 28, 1955, in support of said motion to deny or modify, and said motion having come on regularly to be heard on the 21st day of October, 1955,

"Now, on the submission of said motions, and due deliberation having been had thereon, and it

appearing to the Court that the above entitled proceeding is in all respects regular, and after filing the opinion of the Court, it is, on motion of Buchter, Rathheim, Abrams & Hoffman, Esqs., attorneys for said Iida & Co. New York, Inc.,

"ORDERED, that the award of William A. Hyman, Esq., the Arbitrator in the above entitled proceeding, dated the 28th day of September, 1955, whereby he determined and awarded that the contract between Iida & Co. New York, Inc. and Devidayal (Sales) Ltd., dated December 8, 1954, had been broken and breached by Devidayal (Sales) Ltd., the respondent herein, without justifiable cause, and that said Devidayal (Sales) Ltd. pay to the said Iida & Co. New York, Inc. the sum of $48,852.07, with interest on the sum of $46,800 from March 31, 1955, as damages therefor, and that the said Iida & Co. New York, Inc. should have judgment therefor against the said Devidayal (Sales) Ltd., said judgment to be entered in the Supreme Court, County of New York, and whereby he determined and awarded that the proper fee of said Arbitrator was the sum of $3,500, the said fee to be paid in the first instance by Iida & Co. New York, Inc., and that said Arbitrator's fee, the cost to Iida & Co. New York, Inc. of stenographer's minutes and the cost of the hearing room, should all be taxed by it among its costs and disbursements in this proceeding, be and the award hereby is in all respects confirmed. And it is further

"ORDERED, that the motion of Devidayal (Sales) Ltd. for an order denying or modifying said award,

be and the same hereby is in all respects denied. And it is further

"ORDERED, that the said Iida & Co. New York, Inc. have judgment upon said award, together with its costs and disbursements as taxed, the said judgment to be entered as a judgment in the Supreme Court, New York County. And it is further

"ORDERED, that the said Iida & Co. New York, Inc. be allowed $25.00 costs on this motion to confirm the said award."

Enter,

T. A. A.,
J. S. C.

Enter,

T. A. A.,
J. S. C.

Filed Nov. 29, 1955.

25

Judgment Appealed From.

SUPREME COURT

OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

In the Matter of the Arbitration of certain differences between
IIDA & Co. NEW YORK, INC.
and
DEVIDAYAL (SALES) LTD.

26

Certain controversies existing between Iida & Co. New York, Inc. and Devidayal (Sales) Ltd. having been submitted to arbitration by William A. Hyman, Esq., as Arbitrator appointed by the Court to hear and determine pursuant to the provisions of a certain contract between the said parties dated December 8, 1954, and said Arbitrator having duly proceeded in the matter, and an award having been made and signed by said Arbitrator dated September 28, 1955, and duly filed in the New York County Clerk's office on September 28, 1955, and said award having been duly confirmed by an order of this Court entered in the office of the Clerk of the County of New York on the 28th day of October, 1955,

27

Now, on motion of Buchter, Rathheim, Abrams & Hoffman, Esqs., attorneys for said Iida & Co. New York, Inc., it is

ADJUDGED, that the said Iida & Co. New York, Inc. do recover of the said Devidayal (Sales) Ltd.

28 *Judgment Appealed From.*

the sum of $50, 240.47, with interest thereon from the date of the award, to wit: September 28, 1955, amounting to $284.68, together with $4313.31, the costs and disbursements as taxed, amounting in all to the sum of $54,838.46, and that said Iida & Co. New York, Inc. have execution therefor.

Dated: New York, N. Y.
November 2, 1955.

/s/ ARCHIBALD R. WATSON

Plaintiff's Address:
29 39 Broadway,
New York 6, N. Y.

Defendant's Address:
Reay Road, Mazagaon, Darukhana,
Bombay 10, India.

Motion to Confirm Award of Arbitrator.

SUPREME COURT

OF THE STATE OF NEW YORK,

30 COUNTY OF NEW YORK.

[SAME TITLE.]

Sirs:

PLEASE TAKE NOTICE that upon the award of the Arbitrator in the above entitled proceeding dated September 28, 1955, and filed in the office of the Clerk of the County of New York on the 28th day of September, 1955, upon the affidavit of

Sidney Abrams, verified the 30th day of September, 1955, and upon the stenographer's minutes of the hearings before the Arbitrator, and on all the prior papers and proceedings had heretofore, the undersigned will move this Court at a Special Term, Part I thereof, to be held at the County Court House, Centre and Pearl Streets, in the Borough of Manhattan, City of New York, on the 10th day of October, 1955, or as soon thereafter as counsel can be heard, for an order:

1. Confirming the award of the Arbitrator;

2. Directing judgment to be entered thereon 32
pursuant to statute in that case made and provided;

3. For such other and further relief as to the Court may seem just and proper, together with the costs of this motion.

Answering affidavits are required to be served five (5) days before the return date of this motion.

Dated: New York, N. Y.

September 30, 1955.

Yours, etc. 33

BUCHTER, RATHHEIM, ABRAMS & HOFFMAN,
Attorneys for Petitioner, Iida & Co. New York, Inc.

To:

SCHWARTZ & NAIDICH, Esqs.,
Attorneys for Respondent,
Devidayal (Sales) Ltd.

34

Affidavit of Sidney Abrams, Read in Support of Motion to Confirm.

SUPREME COURT

OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

[SAME TITLE.]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

35 SIDNEY ABRAMS, being duly sworn, deposes and says:

That he is a member of the firm of Buchter, Rathheim, Abrams & Hoffman, the attorneys for Iida & Co. New York, Inc. the petitioner herein;

That heretofore and on the 11th day of March, 1955 an order was duly made by the Hon. Morris Eder, a Justice of this Court, directing that the parties hereto proceed to arbitration in accordance with the terms of a contract entered into between said parties dated December 8, 1954 and appointing William A. Hyman, Esq., of 111 Fulton Street, New York City, as the Arbitrator, to act under said contract as Arbitrator and directing
36 the said Arbitrator to hear and decide any and all controversies, disputes and matters of difference which may have arisen between the parties under said contract dated December 8, 1954, and directing that said arbitration proceed pursuant to Article 84 of the Civil Practice Act, and that said Arbitrator render an award in writing with all convenient speed.

Affidavit of Sidney Abrams, Read in Support of Motion to Confirm.

Thereafter and on the 6th day of June, 1955 at a time and place appointed, notice of which was given to both parties, the said Arbitrator, having subscribed to his oath of office, proceeded to hear proofs of the parties. That the hearings were adjourned from time to time and that twelve (12) meetings in all were held, all of which were attended by both parties to this proceeding before the Arbitrator aforesaid.

That on the 28th day of September, 1955 after the Arbitrator had completed his investigations and studies of all the facts, circumstances, elements and proofs entering into the controversy so submitted to him, as aforesaid, and after he had considered all the evidence and arguments submitted by the parties, the Arbitrator, having come to a decision, made his award in writing, duly acknowledged, dated September 28th, 1955 and filed in the office of the Clerk of the County of New York on the 28th day of September, 1955, whereby said Arbitrator determined and awarded that the contract aforesaid dated the 8th day of December, 1954 had been broken and breached by Devidayal (Sales) Ltd., the respondent herein, without justifiable cause and that the said Devidayal (Sales) Ltd., respondent herein, pay to Iida & Co. New York, Inc., the petitioner herein, the sum of $48,852.07 as damages therefor, with interest on the sum of $46,800. from March 31, 1955.

The parties to this arbitration proceeding having waived the statutory provisions with reference to the Arbitrator's fee, the Arbitrator's fee

40 *Affidavit of Sidney Abrams, Read in Support of Motion to Confirm.*

was fixed by the said award at the sum of $3500.00 and the Arbitrator's award directed that said Arbitrator's fee be paid in the first instance by petitioner, Iida & Co. New York, Inc., as stipulated by the parties, and that said Arbitrator's fee, the cost to the petitioner for stenographic minutes and the rental paid by the petitioner for the hearing room and such other costs and disbursements as may be permitted by the Civil Practice Act should be taxed by the petitioner as its costs and disbursements.

41 In addition to the Arbitrator's fee of $3500.00, the petitioner spent $748.31 for the stenographic minutes of the hearings and the sum of $40.00 for the rental of a hearing room at the New York County Lawyers Library.

WHEREFORE, deponent respectfully prays that an order be made herein confirming said award and directing that judgment be entered thereon in the Supreme Court, New York County, and that the petitioner be allowed the costs of this motion to confirm.

SIDNEY ABRAMS

42 (Sworn to September 30, 1955).

43

Affidavit of Arnold D. Naidich, Read in Opposition to Motion to Confirm.

SUPREME COURT

OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

[SAME TITLE.]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ARNOLD D. NAIDICH, being duly sworn, deposes 44
and says:

That he is a member of the firm of Schwartz & Naidich, the attorneys for Devidayal (Sales) Ltd. the respondent herein:

That the award of the Arbitrator fixing the damages sustained by petitioner in the sum of $46,800. was based upon the difference between the contract price and the market value of the goods at the time and place said goods should have been delivered. The Arbitrator determined the time and place of said delivery to be March 1955 in Bombay, India, and the Arbitrator found that the difference between the contract price and the market price at said time and place was $6.50 45
per ton (Op. Arb. p. 23).

That under the terms of the contract of sale between petitioner and respondent, the goods could be shipped by respondent at any time during January through March 1955 in partial shipments or as one load (Op. Arb. p. 6).

46 *Affidavit of Arnold D. Naidich, Read in Support of Motion to Confirm.*

That on January 6, 1955 respondent declared the contract cancelled (Op. Arb. p. 12).

That petitioner could have purchased replacement ore in the general market in January, February and March 1955 (Op. Arb. pp. 25, 26).

That the market price for replacement ore in India in January 1955 was $26. to $27. per ton, or approximately $2.75 per ton higher than the contract price (s.m. pp. 844, 1012-1013).

That the Arbitrator erred in measuring the
47 damages as the difference between the contract price and the market price in March 1955 since, as aforementioned respondent had the option to deliver the goods at any time from January through March 1955.

That, therefore, no definite time was fixed for delivery and, under the provisions of Section 148 Subdivision 3 of the Personal Property Law, since no time for delivery of the goods was *fixed* damages should be measured as " • • • the difference between the contract price and the market or current price of the goods • • • at the time of the refusal to deliver", to wit, January 6, 1955.

48 WHEREFORE, deponent respectfully prays that an order be made herein modifying the award of the Arbitrator in the manner aforesaid, denying the motion of the petitioner, and directing that judgment be entered thereon in the Supreme Court, New York County, and that the respondent be allowed the cost of this motion.

ARNOLD D. NAIDICH

(Sworn to October 5, 1955).

49

Notice of Cross Motion to Modify Award of Arbitrator.

SUPREME COURT

OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

[SAME TITLE.]

Sirs:

PLEASE TAKE NOTICE that upon the award of the Arbitrator in the above entitled proceeding dated September 28, 1955, and filed in the office of the Clerk of the County of New York on the 28th day of September, 1955, upon the affidavit of Arnold D. Naidich, verified the 5th day of October, 1955, the Notice of Motion on Behalf of Petitioner to Confirm the Award of the Arbitrator dated September 30, 1955, the affidavit of Sidney Abrams, verified the 30th day of September, 1955 in support of said Motion, and upon the stenographer's minutes of the hearings before the Arbitrator and on all the prior papers and proceedings had heretofore, the undersigned will move this Court at a Special Term, Part I thereof, to be held at the County Court House, Centre and Pearl Streets, in the Borough of Manhattan, City of New York, on the 10th day of October, 1955, or as soon thereafter as counsel can be heard, for an order:

50

51

1. Denying the Motion of the petitioner to confirm the award of the Arbitrator;

2. Modifying the award of the Arbitrator to the sum of $19,800 plus $2,052.07, totalling $21,852.07, with interest on the sum of $19,800 from January 6, 1955, together with the costs and disbursements of the proceedings:

52 *Notice of Cross-Motion to Modify Award of Arbitrator.*

3. Directing judgment to be entered upon said award as so modified pursuant to statute in that case made and provided;

4. For such other and further relief as to the Court may seem just and proper together with the costs of this Motion.

Dated: New York, N. Y., October 5, 1955.

Yours, etc.,

53 SCHWARTZ & NAIDICH, Esqs.,
Attorneys for Respondent,
Devidayal (Sales) Ltd.

To:

BUCHTER, RATHHEIM, ABRAMS & HOFFMAN,
Attorneys for Petitioner,
Iida & Co. New York, Inc.

54

55

Affidavit of Arnold D. Naidich, Read in Support of Cross Motion to Modify.

SUPREME COURT

OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

[SAME TITLE.]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

56 ARNOLD D. NAIDICH, being duly sworn, deposes and says:

That he is a member of the firm of Schwartz & Naidich, the attorneys for Devidayal (Sales) Ltd. the respondent herein.

That the award of the Arbitrator fixing the damages sustained by petitioner in the sum of $46,800 was based upon the difference between the contract price and the market value of the goods at the time and place said goods should have been delivered. The Arbitrator determined the time and place of said delivery to be March 1955 in Bombay, India, and the Arbitrator found that the difference between the contract price and the market price at said time and place was $6.50 per 57 ton (Op. Arb. p. 23).

That under the terms of the contract of sale between petitioner and respondent, the goods could be shipped by respondent at any time during January through March 1955 in partial shipments or as one load (Op. Arb. p. 6).

58 *Affidavit of Arnold D. Naidich, Read in Support of Cross-Motion to Modify.*

That on January 6, 1955 respondent declared the contract cancelled (Op. Arb. p. 12).

That petitioner could have purchased replacement ore in the general market in January, February and March 1955 (Op. Arb. pp. 25, 26).

That the market price for replacement ore in India in January 1955 was $26 to $27 per ton, or approximately $2.75 per ton higher than the contract price (s. m. pp. 844, 1012-1013).

That the Arbitrator erred in measuring the dam-
59 ages as the difference between the contract price and the market price in March 1955 since, as aforementioned respondent had the option to deliver the goods at any time from January through March 1955.

That, therefore, no definite time was fixed for delivery and, under the provisions of Section 148 Subdivision 3 of the Personal Property Law, since no time for delivery of the goods was *fixed* damages should be measured as ". . . the difference between the contract price and the market or current price of the goods . . . at the time of the refusal to deliver", to wit, January 6, 1955.

60 WHEREFORE, deponent respectfully prays that an order be made herein modifying the award of the Arbitrator in the manner aforesaid, denying the motion of the petitioner, and directing that judgment be entered thereon in the Supreme Court, New York County, and that the respondent be allowed the cost of this motion.

ARNOLD D. NAIDICH.

(Sworn to October 5, 1955.)

61

Order Appointing Arbitrator.

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse, Pearl and Centre Streets, in the Borough of Manhattan, City of New York, on the 11 day of March, 1955.

Present: Hon. Morris Eder, *Justice.*

In the Matter of the Arbitration of certain differences between

Iida & Co. New York, Inc.,

and

Devidayal (Sales) Ltd.

62

The petitioner, Iida & Co. New York, Inc. having procured an order to show cause herein dated February 14, 1955, directing Devidayal (Sales) Ltd. to show cause before this Court why it should not be directed to submit to arbitration certain matters in dispute between petitioner and said Devidayal (Sales) Ltd. under the contract between them dated December 8, 1954, as provided for in said contract, and why said Devidayal 63
(Sales) Ltd. should not be dir cted to pay the costs, fees and expenses of this proceeding, and petitioner's motion having duly come on to be heard at Special Term, Part I of this Court on March 8, 1955, and the petitioner having appeared by Buchter, Rathheim, Abrams & Hoffman, Esqs., Alfred Rathheim, Esq. of counsel, in support of

said motion, and no one having appeared in opposition to said motion on behalf of Devidayal (Sales) Ltd., the respondent,

Now, on reading and filing the order to show cause dated November 15, 1955, and the petition of Iida & Co. New York, Inc. verified February 5, 1955, with proof of due service thereof, submitted in support of said motion, and due deliberation having been had thereon, and upon filing the opinion of this Court,

65 It is, on motion of Buchter, Rathheim, Abrams & Hoffman, Esqs., attorneys for the petitioner,

ORDERED, that the said parties hereto, Iida & Co. New York, Inc. and Devidayal (Sales) Ltd. proceed to arbitration in accordance with the terms of the contract entered into between said parties dated December 8, 1954; and it is further

ORDERED, that Wm. A. Hyman of 111 Fulton St., City of New York, be and he hereby is appointed arbitrator who shall act under said contract as arbitrator with the same force and effect as if he had been specifically named therein; and it is further

66 ORDERED, that said arbitrator hear and decide any and all controversies, disputes and matters of difference which may have arisen between the parties under said contract of December 8, 1954; and it is further

ORDERED, that said arbitration proceed pursuant to Article 84 of the Civil Practice Act and that said arbitrator appoint a time and place for the

hearing of said matters and cause written notice thereof to be given to each of the parties, and that he render an award in writing with all convenient speed fixing the amount, if any, due and owing from respondent, Devidayal (Sales) Ltd., to the petitioner, Iida & Co. New York, Inc., under said contract of December 8, 1954.

Enter,

M. E.,
J. S. C.

Filed N. Y. Co. Clk's Office March 11/55. 68

Affidavit of Murray Schwartz to File Abridged Record on Appeal

SUPREME COURT

OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

[SAME TITLE.]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.: 69

MURRAY SCHWARTZ, being duly sworn, deposes and says:

I am a member of the firm of Schwartz & Naidich, attorneys for Devidayal (Sales) Ltd., respondent-appellant herein.

I make this affidavit to define specifically the limit of appeal to be taken by respondent-appel-

70 *Affidavit of Murray Schwartz to File Abridged Record on Appeal.*

lant. By such limitation, respondent-appellant will seek a hearing on the appeal on an abridged record.

On November 29, 1955, respondent-appellant filed a notice of appeal from each and every part of a resettled order and a judgment in favor of the above petitioner and against the respondent-appellant for the sum of Fifty-four Thousand Eight Hundred and Thirty-eight and 46/100 ($54,838.46) Dollars. A copy of said notice of appeal is attached hereto and designated "Exhibit A".

71 Respondent-appellant intends to limit its appeal solely to the question of damages. It will be respondent-appellant's contention that in the instant matter the Court has the power and obligation to review the question of damages, on the basis of the applicable law and that the Arbitrator, William A. Hyman, erred as matter of law in determining damages as of March, 1955.

It is believed that the limitation of the appeal will greatly reduce an otherwise voluminous record of some 1023 pages and containing some 129 exhibits.

/sgd/ MURRAY SCHWARTZ

72 (Sworn to December 29, 1955.)

Exhibit A, Annexed to Affidavit of Murray Schwartz

This exhibit is a copy of the Notice of Appeal of Respondent, dated November 29, 1955, and printed in full on page 3, supra.

73

Excerpts from Stenographer's Transcript of Testimony.

[1] SUPREME COURT

OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

[SAME TITLE.]

Arbitration pursuant to an order of the Supreme Court, New York County, dated the 11th day of March, 1955, originally set for the 27th day of April, 1955, at 10:30 A. M., at 111 Fulton 74
Street, City, County and State of New York, and adjourned, by stipulation, to the same place on June 6, 1955, at 2 P. M.

Before: HON. WILLIAM A. HYMAN, *Arbitrator.*

APPEARANCES:

MESSRS. BUCHTER, RATHHEIM, ABRAMS & HOFFMAN, attorneys for the petitioner, Iida & Co. New York, Inc., 61 Broadway, New York, N. Y.; by SIDNEY ABRAMS, Esq., and ALVIN L. KASSEL, Esq., of counsel.

75

MESSRS. SCHWARTZ & NAIDICH, attorneys for the respondent, Devidayal (Sales) Ltd., 130 West 42nd Street, New York, N. Y; by ARNOLD NAIDICH, Esq. and HERBERT LEVENSON, Esq., of counsel.

(Note: Numbers in brackets refer to the pages of stenographer's minutes.)

* * * * * *

76 *Hiroshi Munakata—For Petitioner—Direct.*

[14] HIROSHI MUNAKATA, called as a witness by the petitioner, having been duly sworn, through the interpreter, by the notary public, testified as follows:

Direct examination by Mr. Abrams.

Q. What is your full name? A. Hiroshi Munakata.

Q. Where do you live? A. My present address is Hotel Regent, at 104th Street and Broadway, New York.

Q. Where do you usually live? Where is your
77 residence? A. Taj Mahal Hotel, Bombay.

Q. You are connected with Iida & Co.? A. Yes, I am.

Q. You represent Iida & Co. in Bombay? A. Yes.

Q. How long have you been in Bombay? A. I was in Bombay from the 2nd of June, 1953, to the 18th of May, 1955—a little over two years.

[15] Q. The 18th of May, 1955, is when you came here to New York at our request; is that correct? A. That is the day I left Bombay.

Q. And on the conclusion of this hearing you expect to return to Bombay; is that correct? A. Yes.

78 Q. Do you also represent the Japanese firm known as Iida & Co. Ltd. in Bombay? A. Yes.

Mr. Abrams: Let it be stated for the record that Iida & Co., Ltd., is a Japanese corporation, resident in Tokyo; while Iida & Co. New York, Inc., the petitioner in this proceeding, is a New York corporation which is a subsidiary of the Japanese corporation.

Mr. Naidich: That is consented to.

Mr. Hyman: Would you mind developing more fully what is the relationship? Is he an independent contractor, an officer, a director?

Q. Are you an officer of Iida & Co., Ltd.? A. I am not an officer, as such.

Q. Do you represent Iida & Co. New York, Inc., in Bombay? A. Yes, I do.

[16] Q. Do you represent Iida & Co., Ltd., of Tokyo, in Bombay? A. Yes, I do.

Q. You are the agent, in Bombay, of Iida & Co. New York, Inc.? A. I do not understand what you mean by "agent". 80

Q. You are the representative in Bombay of Iida & Co. New York, Inc.?

Mr. Hyman: He has said that several times. Is he a paid employee, an officer, or director? I want the facts. Is he paid a salary by them?

Q. Are you paid a salary by Iida & Co.? A. Yes, I am.

Mr. Abrams: I take it that there is no question as to the authority of Mr. Munakata to represent Iida & Co. in Bombay? 81

Mr. Naidich: No.

Q. Mr. Munakata, you have, while in Bombay, conducted many negotiations for the purchase of manganese ore? A. Yes.

Q. On behalf of Iida & Co. of Tokyo as well as Iida & Co. of New York? A. Yes.

82 *Hiroshi Munakata—For Petitioner—Direct.*

[17] Q. You have conducted many negotiations for the purchase of manganese ore with the respondent, Devidayal (Sales) Ltd., in Bombay? A. Yes, I have.

Q. Did you, during the year 1954, receive a cable inquiry from the New York office of Iida & Co., asking you to obtain an offer for manganese ore of 46/48 percent purity? A. Yes, I did.

Q. That inquiry was some time prior to the beginning of November, 1954, was it not? A. Yes, it was.

Q. Did you communicate with Devidayal &
83 Company with reference to this inquiry? A. Yes, I did.

Q. Whom did you see at Devidayal? A. Mr. Amirchand Aggarwal, and also Mr. Warrier.

Q. That was, I believe, on November 3rd, 1954, was it not, that you called on Messrs. Aggarwal and Warrier? A. Yes, it was.

Q. And did you receive an offer from Devidayal for the sale of manganese ore to you pursuant to your inquiry? [18] A. Yes, I did.

Q. And did you on the same day, that is, on November 3rd, cable the substance of that offer to your New York office? A. Yes, I did.

* * * * * * *

84 It is stipulated that after negotiations between the parties a contract, Exhibit 13 (p. 146 record on appeal) was entered into.

* * * * * *

[19] Q. Mr. Munakata, do you know how many grades of Indian manganese ore are generally recognized? A. Usually there are six grades.

Q. And the ore for which you were negotiating with Devidayal, how would that ore be classified? Figure 1 as the top grade, 2 as the next grade, and so forth. A. I think it will belong to the second grade.

* * * * * *

[72] Mr. Abrams: I offer in evidence the letter from Devidayal to petitioner, dated January 6, 1955.

Mr. Naidich: No objection.

Mr. Hyman: Will you mark that in evidence as [73] Petitioner's Exhibit No. 21.

(Letter dated January 6, 1955, was marked Petitioner's Exhibit 21 in evidence) (p. 151 record). 86

Mr. Abrams: And I offer in evidence a copy of the letter from Devidayal addressed to the Bank of Tokyo, Bombay, dated January 6, 1955, which was enclosed with Petitioner's Exhibit No. 21 and referred to in Petitioner's Exhibit No. 21.

Mr. Hyman: May I see the other one, Petitioner's Exhibit 21, please? This is a copy that was sent to your bank?

Mr. Abrams: That was enclosed with this, yes.

Mr. Hyman: Will you please mark this then Petitioner's Exhibit No. 22 in evidence. 87

(Letter from Devidayal to the Bank of Tokyo dated January 6, 1955, was marked Petitioner's Exhibit 22 in evidence) (p. 152 record).

Q. Mr. Munakata, you received these two papers together, Petitioner's Exhibits 21 and 22? A. Yes.

88 *Hiroshi Munakata—For Petitioner—Direct.*

I received these together, but not in the same envelope.

Q. They came separately, but at the same time? A. There might have been a slight difference in time but it came practically at the same time.

* * * * * *

[74] Q. Mr. Munakata, you were dealing for a couple of years in manganese ore in India, were you not? A. Yes.

Q. And were you familiar with the market price of the various grades of manganese ore? A. Yes, I am.

89 Q. Were you particularly familiar with the market price of the manganese ore of the grade covered by this contract, Petitioner's Exhibit No. 13? [75] A. Yes, I was.

Q. You started negotiating with Devidayal about the beginning of November for the ore of this quality, is that correct? A. Yes, that is correct.

Q. Can you tell us, as briefly as you can, the market trend on ore of this quality from the time you started negotiations early in November with Devidayal, up to January 6th, the date of the cancellation? A. From the beginning of November, throughout the month of November, there was a gradual rise in the price of manganese ore of

90 this kind. However, from the end of November to January 6th, there was a sudden sharp rise in the price of manganese ore.

Q. Do you know what accounted for the sudden sharp upswing of the price? A. Yes, I know the reason.

Q. What was it? A. One reason was that the American Government had begun to purchase manganese ores for their stock-piling purposes.

Also, along with that, Japan and the European countries began to be active in purchasing manganese ores.

Q. Was there a report in India of United States [76] Government stock-piling of manganese ore in December? A. Yes, there was a rumor or report that the United States Government was going to buy up manganese ores.

Q. When was that publicized? What part of the month of December? A. Approximately in the middle of December.

Q. Do you know, Mr. Munakata, what the market price of ore of the kind contracted by you in 92
Petitioner's Exhibit No. 13, what the market price of that ore was on or about January 6th? Pardon me. Let me amend that. Insert this: what the market price, the CIF price of the ore was? A. In or around January 6th, the highest price on that went over $45 per ton. But, probably it would be safe to say that the average price was either a little above or less than $45, around $45.

Mr. Hyman: Is that .18 phosphorous content or .15 phosphorous content?

The Witness: It is about the same whether the phosphorous contents were 0.15 or 0.18.

Mr. Hyman: I understood the witness to 93
say a little while ago that the ore .15 was a higher priced ore and that was the reason they raised [77] the price 25 cents a ton.

On January 6th, on or about January 6, 1955, was there that same difference? Did they not consider 0.15 ore a better grade than the 0.18?

The Witness: Yes. Of course, 0.15 is better grade and there would be some difference in the price. However, it would be difficult for me to say here exactly how much difference there was in the price, because of the difference in the phosphorous contents; that is, the actual dollars and cents. I would not be able to give you that figure.

Q. Would the difference in price be more than 25 cents? A. Personally, I don't think there would be a difference of 25 cents in price. However, these are matters of negotiating and bargaining.
95 But I am certain that it would not be as high as 25 cents, the difference.

Q. When you tried to get Devidayal to furnish you with .15 phosphorous ore, you told Devidayal you would pay a little more if you could get that, is that correct? A. Yes, that is true, but that was because we [78] had already contracted with Hardy. We didn't want to have any trouble or disputes with Hardy with regard to the quality of the ore. We wanted to fulfill our obligation to Hardy as far as these qualities were concerned.

Q. In other words, then, based on the earlier offer from Devidayal of .15 phosphorus, you had resold the same ore to Hardy on the basis of .15
96 percent, and it is for that reason, to avoid trouble with Hardy, you wanted Devidayal to give you —and you were willing to pay a little more—the .15, although there wasn't much actual difference in the value between the .15 and the .18, or the differences were very slight, is that correct? A. Yes, that is correct.

Mr. Naidich: May I interpose a comment? Am I to presume that the Hardy contract will be offered in evidence some time during the hearing?

Mr. Abrams: Sure.

Mr. Naidich: O.K.

Q. Now, did the market price of ore of this type, whether of .18 or .15 percent phosphorus, continue to rise after January 6th? A. Yes. It has kept on rising after the 6th. [79] In fact, it has been rising even today.

Q. Are you familiar with the CIF price of ore of this type in the month of February, March or April, or May, 1955? A. Yes, I am. 98

Q. Can you tell us briefly what the trend of these prices were? A. From the beginning of December to the end of January was a period in which the price rose very sharply and suddenly. From then on it just rose gradually up to now.

I wouldn't be able to give you exactly how many cents or how many dollars it rose each month, but I can say that from the beginning of February to this date the rise would be about one dollar. It is one dollar higher now than it was at the beginning of February, which was the end of the sharp rise, but the beginning of the gradual rise. 99

Q. And the price at the beginning of February was how much? A. I think the price around the beginning of February was $45 or a little more.

* * * * * *

[82] Q. Following the receipt of the letter of cancellation, Exhibit No. 21, did you consult your lawyer in Bombay? A. Yes, I did.

Q. Did you or your lawyer, or both together, prepare a letter to Devidayal in answer to the letter of January 6th, Exhibit No. 21? A. This letter of January 8th was written by me after consultation with my solicitor. It wasn't written by my solicitor in that sense.

Mr. Abrams: All right, I offer it in evidence as Petitioner's Exhibit No. 27.

Mr. Hyman: All right, admitted into evidence, the January 8th letter. Mark it No. 27.

(Letter of January 8, 1955, was marked
101 Petitioner's [83] Exhibit 27 in evidence) (p. 154, record).

Q. Did you receive this answer to that letter (indicating)? A. Yes, I did.

Mr. Abrams: I offer it in evidence as Petitioner's Exhibit No. 28.

Mr. Naidich: No objection.

Mr. Hyman: All right, mark this Petitioner's Exhibit No. 28 in evidence, the letter of January 10, 1955.

(Letter dated January 10, 1955, was marked Petitioner's Exhibit 28 in evidence) (p. 155 record).
102

Q. Did you again consult your attorney or solicitor after receipt of the letter of January 10th from Devidayal? A. Yes, I did.

Q. And as a result of consulting your attorney, did you prepare a letter, a copy of which I show you, dated January 13th? A. Yes.

Mr. Abrams: I offer it in evidence as Petitioner's Exhibit 29.

Mr. Naidich: No objection.

Mr. Hyman: Admitted in evidence, the letter of January 13, 1955, as Petitioner's Exhibit No. 29.

[84] (Letter dated January 13, 1955, was marked Petitioner's Exhibit 29 in evidence) (p. 156 record).

Q. Mr. Munakata, after you sent this letter of January 13, Exhibit 29, did you keep in communication, either directly or through your staff, with 104
Devidayal's office? A. Yes, I kept contact with them.

Q. What did you do by way of keeping contact with Devidayal? A. Also, because we had other contracts or negotiations with Devidayal, I sent my clerk to Devidayal.

Q. How often? A. I am certain that I must have sent my clerk to Devidayal once every two days.

Mr. Hyman: Did you have any further negotiations relating to manganese ore?

Mr. Abrams: This is manganese ore.

Mr. Hyman: Yes.

The Witness: Yes, there was an occa- 105
sion when I discussed the manganese ore with Devidayal.

Q. When was that? A. On January 18th.

Q. What had happened on January 17th before we go into the 18th? [85] A. On the 17th, my clerk was told by Mr. Aggarwal that Devidayal

106 *Hiroshi Munakata—For Petitioner—Direct.*

would effect a shipment if the price was hiked $2 more.

Q. What did you do on January 18th? A. When my clerk told me about this new demand from Aggarwal, I communicated with my Tokyo office by telephone and informed them that Devidayal would effect a shipment if the price was upped $2.

Q. $2 a ton? A. $2 a ton, yes. The Tokyo office, in consideration of the fulfillment of the Hardy contract, and also to keep up the good reputation of Iida & Co. to all its clients, said that perhaps they could go up one dollar per ton,
107 but not $2.

So, the Tokyo office told me to negotiate with Devidayal for a one dollar hike.

Mr. Hyman: An increase?

A. (Continuing) An increase in the price. Thereupon, on the 18th I went to Devidayal and tried to persuade them to accept a one dollar increase. In doing so, I tried to impress them with the fact that Iida & Co. was desirous of maintaining its good reputation and so-called face in fulfilling contracts.

Q. The last part of that answer referred to losing [86] face and Iida's desire to fulfill its
108 contract. By that, are you referring to Iida's desire to fulfill its contract with Hardy & Company and in not wanting to lose face? A. Of course, the face that we wanted to save, or the reputation that we wanted to maintain, was directed towards Hardy as well. But this was a question of maintaining such a face and keeping up such a reputation generally in any kind of action.

Q. Did Devidayal agree to this increase of one dollar a ton instead of $2 a ton? A. No, they did not.

Q. What did they insist on? A. They insisted that $2 was the price, $2 increase.

* * * * * *

[87] POUL W. FRICKE, called as a witness in behalf of the petitioner, having been first duly sworn, testified as follows:

Direct examination by Mr. Abrams.

Q. What is your name? A. Poul W. Fricke. 110

Q. Mr. Fricke, where do you live? A. In 125 Gates Avenue, Montclair, New Jersey.

Q. You are president of the M. W. Hardy & Company? A. Yes, I am.

Q. What business is M. W. Hardy engaged in? A. In the metals, ores and chemicals.

Q. How long have you been connected with the M. W. Hardy & Company? A. Since we formed the corporation in New York, in November, 1947.

Mr. Hyman: Have you got a New York address?

The Witness: 141 Broadway, New York.

111

Q. I believe you were also engaged for many years [88] prior to that in the shipping business? A. Yes, sir.

Q. Will you tell us of your experience in the shipping business? A. Well, I was the manager in Los Angeles for the East Asiatic Company for about ten years. I was transferred to San Francisco and later to New York. I was with them for sixteen years.

112 *Poul W. Fricke—For Petitioner—Direct.*

Q. What was the East Asiatic Company engaged in? A. As you may know—our Indian friends may know that—they are all over India. They are also in the ore business and in all general merchandising.

Then they are ship owners. They have fifty-six ships of their own and they have various services all over the world. They also have some charter ships and tramp ships in the fleet for chartering.

* * * * * *

[106] Q. Did you—when I say "you", I mean
113 M. W. Hardy & Company—on December 2, 1954, enter into a contract with the Iida Company for the 8,000 tons of Indian manganese ore? A. Yes, sir.

Mr. Hyman: What is that date, please?
Mr. Abrams: December 2, 1954.

Q. I show you this photostat and ask you whether that is a copy of the contract that was entered into? A. Yes, that is a true copy.

Mr. Abrams: All right, I offer it in evidence.

[107] Mr. Hyman: Where is the original?
114 Mr. Abrams: In their files.

Mr. Hyman: You are offering a photostatic copy. I think you should have gotten the original.

Mr. Abrams: We have the original.

Mr. Naidich: I have never seen it.

Mr. Abrams: Let us go off the record.

(Discussion off the record.)

Mr. Hyman: If Mr. Fricke will state under oath that this photostatic copy is a true and

115

correct copy of the original in his possession, maintained in his office records, I don't think we will raise any question about it. But you have just the photostatic copy without accounting for it.

The Witness: Yes, I will state that. It is a true copy.

Mr. Hyman: I don't think it is necessary to produce the original.

Mr. Naidich: I have no objection.

Mr. Hyman: Mark that Petitioner's Exhibit No. 30 in evidence.

(The contract dated December 2, 1954, was marked Petitioner's Exhibit 30 in evidence) (p. 158 record).

116

Q. Mr. Fricke, did Iida & Company deliver under [108] this contract, Exhibit 30, did they deliver 8,000 tons of ore to you? A. No, sir, they did not.

Q. Did Iida—did you ascertain why they didn't deliver under the contract to you? A. Yes. They told us when they finally decided that they could not deliver, they told us that their suppliers failed to do it.

Q. You knew that they were purchasing the 8,000 tons to deliver to you, that they were purchasing it from Devidayal? A. Yes, we did that because we had some negotiations with Devidayal before.

117

Q. In fact, you received a cable from Devidayal, did you not? A. Yes.

Q. You also cabled Devidayal asking for their cooperation to fulfill the Iida contract? A. Yes, right. We have a copy of that.

Q. It is already in evidence here. Did there come a point in February 1955 when you arranged with Iida & Company to settle their failure to deliver you under the contract, Exhibit 30? A. Yes, sir. We had some discussions before that [109] date. As we had told them, if they could find another way of getting us ore, we would be satisfied, but apparently they weren't able to find anyone to supply under that contract.

Mr. Naidich: I will object to the latter part of the witness' statement.

119 Mr. Hyman: Well, they didn't do so.

Mr. Naidich: They didn't comply.

The Witness: I talk too much, maybe?

Mr. Hyman: No, it is all right. We don't expect you——

The Witness: I am not on any side. But that is not the point.

Q. I show you a letter dated February 17, 1955, and ask you whether this is a duplicate original of the agreement entered into between you and Iida & Company? A. Yes, that it is.

Mr. Abrams: I offer it in evidence as Petitioner's Exhibit 31.

120 Mr. Hyman: May I ask you, Mr. Fricke, did you try to get this manganese ore anywhere else?

The Witness: Up to that time, no.

Mr. Hyman: You depended upon the suppliers, Iida & Company?

[110] The Witness: Yes.

Mr. Hyman: And Devidayal?

The Witness: We were under contract with them.

Mr. Hyman: I am not arguing. I am just asking a question. You relied upon that contract?

The Witness: Yes.

Mr. Hyman: You expected your supplies to be furnished by the supplier, the petitioner Iida.

The Witness: Correct.

Mr. Hyman: All right, mark that into evidence as Petitioner's Exhibit No. 31.

(Letter dated February 17, 1955, was marked Petitioner's Exhibit 31 in evidence) (p. 164 record). 122

Mr. Naidich: Have you a copy of the original contract?

Mr. Kassel: The Hardy contract?

Mr. Naidich: Yes.

(Counsel hands contract to Mr. Naidich.)

Mr. Naidich: I have no objection.

Q. Did you on the same day, probably at the same time, receive this check from Iida & Co. (indicating)? A. Yes, we did the same day.

[111] Mr. Abrams: I offer it in evidence as Petitioner's Exhibit No. 32.

Mr. Hyman: This is Exhibit 32 in evidence. 123

Mr. Naidich: No objection.

(Check from Iida & Co. to M. W. Hardy was marked Petitioner's Exhibit 32 in evidence) (p. 166 record).

Mr. Abrams: It will be noted, of course, that the check was paid and so marked.

Mr. Naidich: It speaks for itself.

124 *Poul W. Fricke—For Petitioner—Direct.*

Q. Did you on or about February 23rd receive a letter of credit from Iida & Co. issued by the Bank of Tokyo, New York agency, for the balance of the settlement that you made, $34,600? A. Yes, sir. Right.

Mr. Abrams: I offer it in evidence. One moment.

Q. This is the correct copy of that letter of credit? A. Yes, sir.

Q. You have that original? A. We have the original.

125

Mr. Abrams: All right, I offer it in evidence as Petitioner's Exhibit No. 33.

Mr. Hyman: This is February 23rd. Mark that in evidence, please.

(The letter of credit dated February 23, 1955, [112] was marked Petitioner's Exhibit 33 in evidence) (p. 168 record).

Q. Mr. Fricke, following the signing of the settlement agreement, Exhibit 31, did you make efforts to replace the 8,000 tons of ore? A. Yes, we did.

Q. Where did you make such efforts? A. Well,
126 by cables abroad to India, and with also a local importer of ore that we were very friendly with. They were handling a great deal of ore, which in many cases they are not committed on. So that we were able to get 5500 tons, and the other 2,000 we got from India, we bought from India.

Mr. Hyman: Where did you get the 5500 tons?

The Witness: From whom?

Mr. Abrams: I am going to show you the contracts right now.

Mr. Hyman: I want to get the chronology. Will you tell us who he got it from?

The Witness: Yes. The Associated Metal and a copy of the contract is here.

Q. You finally succeeded in entering into a contract on March 14th with the Associated Metal & Minerals Corporation, 75 West Street, for two to three thousand tons; is that correct? [113] A. Yes.

Q. This is the duplicate original of the contract you entered into? A. Yes. 128

Mr. Abrams: I offer it in evidence as Petitioner's Exhibit No. 34.

Mr. Hyman: What is the date of that?

Mr. Abrams: March 14th, 1955.

The Witness: That was part of it.

Mr. Hyman: That is for how many tons?

Mr. Abrams: That is two to three thousand tons.

Mr. Hyman: Do you have any confirmation of the purchase of 5500 tons?

Mr. Abrams: Yes.

Mr. Hyman: Mark this Petitioner's Exhibit No. 34, please. 129

(The contract dated March 14, 1955, was marked Petitioner's Exhibit 34 in evidence) (p. 170 record).

Q. I show you another contract with Associated Metals & Minerals, between you and Associated Metals, dated March 25th and ask you whether

130 *Poul W. Fricke—For Petitioner—Direct.*

this is a copy of the contract entered jnto by you in order to fill a part of your contract with Iida, namely, 2,000 tons? A. 3,000.

[114] Q. 3,000 tons. A. Which means that we actually bought from five to six thousand.

Q. From Associated Metals? A. Right.

Mr. Abrams: This is offered in evidence as Petitioner's Exhibit 35.

Mr. Hyman: At what price, $44.50?

Mr. Kassel: I think this is different. $44—

Mr. Abrams: $44.75.

Mr. Naidich: No objection.

131 Mr. Hyman: All right, mark this Exhibit 35.

(The contract dated March 25, 1955, was marked Petitioner's Exhibit 35 in evidence) (p. 174 record).

Q. I show you a contract between Hardy & Company and an Indian supplier, Pahladrai, for 2,000 tons, dated March 22, 1955, completing the 8,000 tons covered by the Iida contract and ask you whether that was entered into? A. Yes, sir.

Q. And that contract is for $44 a ton, is that correct? A. Correct.

132 Mr. Abrams: I offer it in evidence.

Mr. Hyman: Show it to Mr. Naidich, please.

[115] (Mr. Abrams hands document to Mr. Naidich.)

Mr. Hyman: What is the price on this one?

Mr. Abrams: 2,000 tons at $44.

Mr. Naidich: No objection.

Mr. Hyman: Mark this Petitioner's Exhibit 36 in evidence.

(The contract dated March 22, 1955, was marked Petitioner's Exhibit 36 in evidence) (p. 177 record).

Q. These three contracts, Exhibits 34, 35 and 36 were entered into by you to cover the 8,000 tons called for by the Iida contract? A. Right.

* * * * * *

[116] Q. Your contract with Iida, Exhibit 30, was on a CIF Mobile basis, is that correct? A. Yes, sir. 134

Q. What does CIF mean, the business meaning? A. Cost, insurance and freight.

Q. That was all included in the price? A. Right.

Q. Now, the two contracts with Associated Metals, Exhibits 34 and 35, are C & F. What do the letters C & F mean? A. It means cost and freight.

Q. Who would have to pay the insurance? A. We would, the buyer.

Q. In addition to the price? A. Right.

Q. Also, your contract with Iida called for delivery at Mobile. A. Yes.

Q. These two contracts, the contract with the 135 letterhead, No. 36, called for delivery to Baltimore? A. Yes, sir.

Q. Were you able to get delivery at Mobile from any people whom you tried—from whom you solicited to supply the tonnage? [117] A. Only the one contract we have here, Exhibit 34, we bought C & F Mobile, two to three thousand tons.

136 *Poul W. Fricke—For Petitioner—Direct.*

But, unfortunately, only a very small—much fewer ships are coming from India to Mobile. Our contract with our buyer called for Mobile. When we had made the agreement with Iida that we would buy the ore ourselves. We went to our buyers but they wouldn't agree to change Mobile to Baltimore. That is why it took us quite a while before we could put it over. Finally, we succeeded in making our buyers agree to Baltimore provided we shipped at least two to three thousand tons to Mobile.

137 Mr. Hyman: You mean to state there was added to the cost the additional portage from Baltimore to Mobile?

The Witness: No. The steamer, instead of——

Mr. Hyman: Instead of unloading in Mobile, unloaded in Baltimore. Your buyers accepted Baltimore?

The Witness: Yes.

Q. Will you look at the specification of the ore in all three contracts and tell us whether this ore you bought to fill out the tonnage was as good as, better, or poorer than the quality of ore you purchased from Iida?

138 Mr. Hyman: Or about approximately the same quality.

A. They were actually poorer.

Q. This was poorer? A. We occasionally get ore poorer. Then we had to demand——

Mr. Hyman: Mr. Witness, the question is simply this: As to whether the ore which

you purchased was better, approximately the same, or poorer than the ore you contracted to buy from Iida.

The Witness: It was poorer.

Mr. Hyman: That is the answer. Answer the questions, please.

Q. Did you have to take poorer ore in order to get the tonnage? A. Yes, but we had to get permission from our buyers, to agree to the poor ore.

Q. Was there a shortage of this type of ore you bought from Iida? Was there any scarcity? [119] A. The scarcity became in March. In March 140
it was difficult. You must remember, we contracted in December. So the whole thing changed.

Q. The market was tight in March? A. Yes.

* * * * * *

[120] Q. Were these three contracts made and entered into, Exhibits 34, 35 and 36, the best you could get to fulfill the Iida contract? A. That is to the best of our ability. I don't mean to say we are the best people in New York in the ore business, but we certainly could not get anything better.

Q. So the prices which these three contracts entered into were $44 for one lot of 2,000 tons, $44.50 [121] for another lot and $44.75 for an- 141
other lot. Are these approximately market prices?

Mr. Hyman: Your answer is yes?

The Witness: Yes.

Mr. Hyman: Fair and reasonable market prices.

Mr. Abrams: Fair and reasonable market prices for the ore.

Mr. Naidich: I am going to object. It calls for a conclusion.

Mr. Hyman: He can state, being familiar with the market and business conditions, what the market value was at that time, approximately.

A. Yes.

Q. Do you know, Mr. Fricke, what the trend of the market was in Indian ore of this type between December 8th, the date of the contract between Devidayal and Iida, and January 6th, the date the Iida contract was cancelled by Devidayal?

143 A. Yes, the trend was up and upward right along.

Mr. Abrams: That is all.

Mr. Hyman: Cross-examine.

* * * * * *

[168] Hiroshi Munakata resumed.

Direct examination by Mr. Abrams (continued).

* * * * * *

[169] Q. Mr. Munakata, on Wednesday you told us about a meeting you had with Mr. Aggarwal on January 18th in which he asked you for an increase of $2 a ton to ship the merchandise. At

144 that meeting did you ask Mr. Aggarwal to put that offer in a letter or writing? A. Yes, I did.

Q. What did Mr. Aggarwal say? A. He replied that he could not do so.

Mr. Hyman: Did he give a reason?

The Witness: Yes, he did.

Q. What was it? A. He said that he knew I felt that writing a letter and putting this in writ

145

ing would be disadvantageous to him. So he said he could not put it in writing.

* * * * * *

[173] Q. After you received the letter from Devidayal on January 21, Exhibit 37, were you told by the New York office to try to procure replacement cargo for the 8,000 sold to Hardy? A. Yes, I was.

Q. What efforts did you make to procure replacement cargo for the 8,000? A. I contacted all the other shippers I knew to obtain their offer for the ores which would meet the terms in the 146
contract, that is, the quality and quantity and the shipping available, and such.

Q. Was 8,000 tons of this ore a large quantity, a small quantity or an ordinary quantity? A. It is a large quantity.

Q. What is the normal or usual quantity sold and purchased?

Mr. Hyman: Don't you think that is rather irrelevant? It might be 5,000, 2,000, according——

Mr. Abrams: It is usually about 2500 tons. 8,000 is a terrific amount. 8,000 is a whole freighter.

[174] Mr. Hyman: He said so, but what 147
difference does it make?

Mr. Abrams: It is the difficulty of replacing.

Mr. Hyman: I appreciate that. Could he get any manganese at any price after the alleged failure of Devidayal to deliver, and if so, at what price on the market at that time?

Mr. Abrams: Just a moment. You got to add to that January, February or March delivery.

Mr. Hyman: Oh, yes.

Q. To fulfill the Hardy contract.

A. No, ores could not have been obtained at that time for that quantity.

Q. You could not get this quantity of ore, 8,000, for delivery, for January, February or March, and at the same specifications, at any price? You could not get offers from the dealers you con-
149 tacted?

Mr. Hyman: He said so in reply to my question.

Mr. Abrams: I said, any price.

Mr. Hyman: Yes.

Mr. Abrams: All right, I will withdraw that.

Q. Did you receive requests from the New York [175] office immediately after the cancellation of January 6 to try to replace the cargo? A. Yes, I did.

Q. Is this the cable you received, with the cer-
150 tified translation thereof, dated January 9th?

Mr. Hyman: Let us take one at a time.

Mr. Abrams: That is only one.

Mr. Hyman: They are both the same?

Q. There is a copy to you, a copy of the original? A. Yes, this is.

151

Mr. Abrams: I offer it in evidence.

Mr. Hyman: Mark it Petitioner's Exhibit 39.

Mr. Naidich: No objection.

(The cable from the New York office, dated January 9, 1955, was marked Petitioner's Exhibit 39 in evidence) (p. 182 record).

Q. Following receipt of that cable, Exhibit 39, you made efforts to procure replacement cargo? A. Yes, I did.

152

Q. And as you said, you had no success. Did you then, on January 11th, cable your New York office with reference to your efforts?

Mr. Hyman: May we separate these two questions? You made a statement you had no success, and then [176] you proceeded with the cablegram. Will you separate that in two?

Mr. Abrams: No success, and the answer to that is yes.

Mr. Hyman: No, let him answer. I don't want your testimony. Let him answer.

153

A. That is correct, I didn't succeed in obtaining replacements.

Q. All right. The next question is did you then send a cable to your New York office on January 11th? A. Yes, I did.

Q. Is this a copy of the cable? A. Yes, it is.

Mr. Abrams: I offer it in evidence.

Mr. Naidich: No objection.

Mr. Hyman: Wait a minute. This is 40?

Mr. Abrams: 40, yes.

Mr. Hyman: It may be so marked.

(The cable to New York office dated January 11, 1955, was marked Petitioner's Exhibit 40 in evidence) (p. 182 record).

Mr. Hyman: This is his cable to the New York office?

Mr. Abrams: Yes, advising that he cannot get [177] replacement.

Mr. Hyman: I can read it. Don't repeat it.

155

Q. Following the dispatch of this cable, Exhibit 40, did you write in detail to your New York office? A. Yes, I did.

Q. Is this the original letter sent by you, dated January 12, 1955, to your New York office and attached thereto is the certified translation? A. Yes.

Mr. Abrams: I offer it in evidence.

Mr. Hyman: Any objection?

Mr. Naidich: No objection, sir.

Mr. Hyman: Mark that Exhibit No. 41.

(The letter to the New York office, dated
156 January 12, 1955, was marked Petitioner's Exhibit 41 in evidence) (not printed).

Mr. Hyman: This cable does not purport to show the signature—I mean this letter. I think you ought to state from whom and to whom, the individuals involved. It is a letter sent by this witness?

Mr. Abrams: It is a letter sent by this witness, the original of which is produced,

157

and it is signed by the witness. He points out the [178] identification and method of signing the letter of this witness above the address and office of Iida & Company. That is the method of signing it. The original letter is produced from the New York file of Iida & Company. This is annexed to the translation of the letter.

Mr. Hyman: All right, proceed.

Q. Did you, on or about February 2nd, receive a cable from your New York office with reference to replacing the 8,000 tons, and is this the cable? A. Yes, I did, and this is the cable.

158

Mr. Abrams: I offer it in evidence.

Mr. Naidich: No objection.

Mr. Hyman: This was sent to the witness from the New York office?

Mr. Abrams: That's right.

Mr. Hyman: All right, mark that Exhibit 42, there being no objection.

(The cable from New York office dated February 2, 1955, was marked Petitioner's Exhibit 42 in evidence) (p. 182 record).

159

Q. Following receipt of that cable, Exhibit 42, did you investigate as to the ownership of that cargo? A. Yes, I did.

[179] Q. And did you report to New York by cable on February 9th the result of your investigation? A. Yes, I did.

Q. Did you receive a further cable from New York on February 9th with reference to the float-

ing cargo and is this the cable of inquiry? A. Yes, I did, and this is the cable.

Mr. Abrams: I offer it in evidence.

Mr. Hyman: Mark it Exhibit 43 in evidence, there being no objection.

Mr. Naidich: I interpose something in the nature of an objection. I believe that the witness, Mr. Abrams, stated that he cabled to New York and this is a reply to the cable.

Mr. Abrams: No, I dropped that. I am coming to it right now. This is another cable
161 from New York on the same subject.

Mr. Naidich: I have no objection.

(The cable from New York office, dated February 9, 1955, was marked Petitioner's Exhibit 43 in evidence) (p. 183 record).

Q. Did you send this cable to your New York office on February 14th? A. Yes, I did.

[180] Mr. Abrams: I offer it in evidence.

Mr. Hyman: Any objection? Mark it Exhibit 44 in evidence.

Mr. Naidich: No objection.

Mr. Hyman: This is from the witness to
162 the New York office?

Mr. Abrams: Yes.

(The cable to the New York office, dated February 14, 1955, was marked Petitioner's Exhibit 44 in evidence) (p. 183 record).

Q. Did you receive a cable on February 14th from your New York office and is this the copy thereof? A. Yes, I did, and this is the cablegram.

Mr. Abrams: I offer it in evidence.

Mr. Hyman: Mark it—no objection——

Mr. Naidich: No objection.

Mr. Hyman: —being urged, as No. 45.

(The cable from New York office dated February 14, 1955, was marked Petitioner's Exhibit 45 in evidence) (p. 184 record).

Mr. Hyman: What is the date of the document you are offering now?

Mr. Kassel: February 14th.

Mr. Hyman: That is Exhibit 45. 164

* * * * * *

[181] Q. Mr. Munakata, I ask you whether you sent an answer to New York with reference to Exhibit 42 which was the cable from New York to you——

* * * * * *

A. I had understood the question meant whether I had sent a cablegram that is referred to to the New York office. I didn't quite—I misunderstood the question of the date, I think. I answered that I had seen the cablegram.

But I didn't mean to say that I had seen the cablegram on the 9th, so that the question is, if it is on the 9th, then my answer is no. If the question is just that I had seen the cablegram, the answer is yes. 165

* * * * * *

[192] *Cross-examination by Mr. Naidich.*

* * * * * *

[241] Q. Now, I believe you testified that after January 6th, when you were advised that Devid-

ayal, that they considered the contract canceled, you remained in communication with them, is that correct? A. Yes, I did.

Q. I believe you also testified that you went to Devidayal after learning that, as you stated, they would affect the shipment if the price was hiked $2 a ton, is that correct? A. Yes, I did.

Q. Did you ever attempt to go back to Devidayal and take them up on this $2 offer when, as you testified, you noticed the price was going up very sharply? A. No, I did not.

167 Q. Yet you were willing to pay a price greatly in excess of this price of $2 per ton increase which you claim Devidayal offered?

Mr. Hyman: Why?

Mr. Abrams: That is surely argumentative. February 17th.

Mr. Hyman: I don't think he said he was willing to pay at that time in excess. He thought [242] the demand was unfair. He thought he had certain contractual rights.

(Discussion off the record.)

Mr. Naidich: A reasonable amount would have been $2.

Mr. Abrams: A reasonable amount would

168 have held up——

Mr. Naidich: How long after this January 17th meeting——

Mr. Abrams: The 18th, the meeting. He called on the 17th, and on the 18th——

Q. How long after this January 18th meeting were you apprised of the fact that you could not get the shipment from any other parties as you

testified? A. At the time, that is, by January 18th, I had been trying to find replacement, but even by then it was almost impossible to obtain any replacement.

Mr. Hyman: What is the date of the $2 incident?

Mr. Naidich: January 18th.

Q. Yet you never approached Devidayal to accept their $2 offer which you claim was made? A. No, I did not.

170

Q. I direct your attention to Exhibit 41, in which it is stated in part: "As a result of our investigations [243] to ascertain the real intention of Devidayal, we think that Devidayal is having difficulty in obtaining ores we require with iron and silica content because about 2,000 tons of the 8,000 contracted with us suddenly became unavailable to them due to some cancellation trouble with the mines." A. Yes.

Q. Was this based on your investigations? A. Yes, and rumors to this effect were going around in Bombay at the time.

Q. Nevertheless you contend that Devidayal offered to make the shipment as you said for the $2 increase, is that correct? A. This question 171 of the results of my investigation was the rumors that were going around in Bombay. Now, as to Devidayal's request of a $2 increase for which they would make a shipment, that was done by Devidayals. It is not my place to say they didn't make that offer. They had made that offer.

. . . . . .

172 *Hiroshi Munakata—Recalled for Petitioner—Redirect.*

[251] *Redirect examination by Mr. Abrams.*

. . . . . .

[273] Q. On January 18, Devidayal offered to ship ore if you would pay $2 a ton increase and you refused. [274] Why didn't you go back to Devidayal and accept his $2 increase when you found you could not replace the tonnage? A. That was very simple. After that I wasn't—I could not trust Devidayal. I could not trust their good faith.

. . . . . .

173 [282] *Recross-examination by Mr. Naidich.*

. . . . . .

[303] Q. Now, I believe you also testified that you didn't want to go back to Devidayal concerning their alleged $2 increase offer because you didn't trust them, [304] is that correct? A. Yes, I did.

Q. Did you negotiate any contracts with Devidayal subsequent to this incident? A. No.

Q. This was the last contract that you negotiated with them?

Mr. Abrams: He said subsequent to this incident of January 18th. This contract was
174 December 8th.

Mr. Naidich: I am talking about the time of the alleged breach.

Mr. Abrams: You are talking about January 18th and the $2 over

Mr. Naidich: Let me withdraw that question.

Hiroshi Munakata—Recalled for Petitioner—Recross. 175

Q. Since January 18th you have not negotiated any further contracts with Devidayal, is that correct? A. No, I never did.

Q. I am referring to negotiations, not the signing of contracts. A. No, I have not negotiated after January 18th.

* * * * * *

Yoshiyuki Kato, called as a witness by the petitioner, having been duly sworn, through the interpreter, by the notary public, testified as follows: 176

Direct examination by Mr. Abrams:

Q. What is your name? A. Yoshiyuki Kato.

Q. Where do you live, Mr. Kato? A. Hotel Regent, 104th Street and Broadway, New York City.

Q. Are you employed by Iida & Co. in New York? A. Yes, I am.

[308] Q. In what capacity? A. I handle metals.

Q. How long have you been in the employ of Iida Company, New York? A. Since September, 1953 to date. 177

Q. Prior, were you in the employ of the home office of Iida in Tokyo? A. Yes, I was.

Q. How long? A. I entered Iida in March, 1948.

Q. What were your duties in Japan? A. Also in metals.

* * * * * *

Q. Now, in about November, 1954 were you negotiating [309] with Hardy & Company to sell

it manganese ore? A. Yes, but this negotiation was conducted through Benjamin Schwartz & Company.

Q. Do you mean that Benjamin Schwartz & Company were the brokers through whom you negotiated with Hardy? A. Yes.

Q. Did you, as a result of these negotiations, arrange a contract with Hardy & Company on December 2nd, or about December 2, 1954? A. Yes, on December 2nd.

Q. While you were negotiating with Hardy & Company for the sale of manganese ore did you
179 communicate with your Bombay office and ask it to get an offer on the same ore? A. Yes, I did.

* * * * * * *

[310] Q. Did you receive any advice from your Bombay office before you closed your contract with Hardy on [311] December 2nd that it had an offer on the same ore from Devidayal? A. Yes.

* * * * * * *

Q. I show you Exhibit No. 4 (p. 145 record) and ask you whether you received that from your Bombay office on December 1st? A. Yes, I did.

* * * * * * *

[312] Q. Did you receive this cable on Decem-
180 ber 1st? A. Yes, I did.

Q. Did you take—after the receipt of Exhibit 4 did you take up the terms mentioned in that exhibit with Hardy? A. Yes, I did so. And, as I said before, all the negotiations were done through Benjamin Schwartz.

* * * * * * *

[313] Q. In your negotiations with Benjamin Schwartz & Company on December 1st, after the receipt of Exhibit 4, what were the terms of the proposed deal with Hardy & Company?

* * * * * *

A. The terms of the offer are exactly as in Exhibit 4. These are the terms that we had presented to Hardy.

[314] Q. You mean the terms in so far as specifications are concerned, I presume? A. Yes. We presented the specifications to Hardy exactly in accordance with the specifications notified to us from Bombay. That is the specifications they 182
obtained, the Bombay office, obtained from Devidayal.

Q. Did Hardy & Company, through Benjamin Schwartz, accept your offer on these terms? A. They agreed to all specifications and terms of this proposal, except with regard to the payment.

Q. In other words, you had your own terms of payments under which Hardy & Company was to pay you?

Mr. Hyman: I understood that from his answer. It is quite clear.

Mr. Abrams: I wasn't sure whether it was clear. 183

Q. And did you then send to your Bombay office the cable, Exhibit 5 (p. 146 record)? A. Yes, I did.

Mr. Hyman: That is Petitioner's Exhibit No. 5?

Mr. Abrams: Yes.

Q. Did you, on the next day, December 2nd, enter into a formal contract with Hardy for the sale to it of the manganese ore? A. Yes, I did.

[315] Q. This was for the same quantity of ore, 8,000 tons, as you were buying from Devidayal, as you thought you were buying from Devidayal, is that correct? A. Yes, it was.

Q. Ore of the same specifications? In other words, the same ore that you thought you were buying from Devidayal? A. Yes, that is correct.

* * * * * *

[319] Q. What was the deal you made with
185 Hardy on December 2nd? A. Well, the terms exactly as in the contract of December 2nd, concluded with Hardy.

* * * * * *

[326] Q. Were you, on January 6th, or immediately thereafter, advised by your Bombay office of the cancellation of the Devidayal contract? A. Yes, I was.

Q. Did you try to replace the ore covered by the Devidayal contract in order to furnish it to Hardy? A. Yes, I did.

Q. What did you do to try to replace the ore? A. I contacted my Bombay office and asked them to look into the possibility of finding a replace-
186 ment, [327] that is, to try to get some ores from shippers in Bombay, and at the same time I also asked Mr. Rodney of Benjamin Schwartz to see if he could not find some replacement in New York.

Q. Did you have any success in either line? A. No, I didn't succeed in obtaining the replacement.

Q. Did you also, when you would not be able to deliver to Hardy on time, ask Hardy to extend

the shipping dates under your contract with Hardy? A. Yes, I made such a request.

Q. And did Hardy agree? A. No, Hardy did not agree.

Mr. Hyman: When you say you made efforts to replace this ore, you say the efforts were not successful. Will you please tell us whether or not there was any ore of this type available in the market at any price? Or did you say there was no ore available at any price?

The Witness: It wasn't a question of the price by this time. There were no ores of this grade in the market. 188

Mr. Hyman: Of this grade?

The Witness: This grade of ore in the market.

Q. Did you mean there was no ore of this grade [328] for shipping January, February and March, which was the date you had to supply Hardy? A. In other words, there were no ores which would meet the terms of the contract with Hardy.

Q. And that is why you asked Hardy to extend the shipping date so as to give you a chance to get later shipments of the same kind of ores? A. Yes, that is correct. 189

Mr. Hyman: You know Hardy did get the ore finally?

Mr. Abrams: Not for these shipping dates.

Mr. Kassel: At a higher price.

Mr. Abrams: We will go into that. $44.50, and an April or May shipment, not January, February or March.

Mr. Hyman: Yes.

Q. When you found you could not replace the ore, did you communicate with Hardy and tell Hardy that you could not make delivery? A. Yes, I did.

Q. About when did you tell this to Hardy? A. I think it was about the end of January.

Q. Did you talk directly to Hardy or through the brokers at that time? [329] A. It was through Mr. Rodney of Benjamin Schwartz.

Q. What conversation did you have with Mr. Rodney about replacing the ore? A. First, I told Mr. Rodney that Iida could not find a replacement
191 and I asked Mr. Rodney to transmit this message to Hardy.

Immediately after that Mr. Rodney informed me that he had heard that Hardy itself may be able to find a replacement of the ores for us.

Q. What was the next conversation with Mr. Rodney about replacing the ores by anyone?

Mr. Hyman: Give the question again.

(The pending question was read by the reporter.)

A. He told me that Hardy's demand and request was for us, Iida, was to transfer the right to find
192 or buy a replacement, that Iida relinquish its right to Hardy and allow Hardy to buy the replacement themselves.

Q. Do you mean Hardy wanted authorization from Iida to replace the ore? A. Yes, that is what I mean.

Q. And did you then give Hardy a written authorization to replace the ore? A. Yes, I gave Hardy a written authorization on February 7th.

[330] Q. When you had your talk with Mr. Rodney about giving the authorization to Hardy, did Rodney tell you what price Hardy thought it could replace the ore? A. Well, at first Mr. Rodney told me, aside from the fact that Hardy had their eye on the grade of ores which met the specifications, the analysis specifications, he received no information about the price.

Then, a day or two later, I was told that Hardy thought that the price would be around $44 CIF, discharge Mobile.

Q. And did you then, after you were told about this possible price of $44, did you give this letter to Hardy? A. Yes, I did. 194

Mr. Abrams: I offer it in evidence as Petitioner's Exhibit No. 55.

Mr. Hyman: Show this to Mr. Naidich.

Mr. Naidich: No objection.

Mr. Hyman: Mark that, please, Petitioner's Exhibit No. 55 in evidence.

(The letter of Iida to Hardy dated February 7, 1955, was marked Petitioner's Exhibit 55 in evidence) (p. 184 record).

[331] Q. Did you have any further talk with Mr. Rodney about replacement cargo a few days after February 7th? A. Yes, I did. In fact, I talked to him almost every day. 195

Q. Was there any talk about Hardy being able to get a cargo that was afloat at sea at that time? A. When he received the information that the price might be around $44 per ton, that cargo was the floating cargo.

Q. Did Rodney tell you that Hardy got that floating cargo? A. No. He said that it might be possible to buy that floating cargo.

Q. Do you know whether he did subsequently buy that floating cargo? A. Yes, I know. They did not buy this cargo. In fact, they weren't able to buy this cargo.

Q. Did you immediately after your talk with Rodney cable your Bombay office to try to get information about this floating cargo? A. Yes, I did.

Q. I show you Petitioner's Exhibit No. 42 and ask you whether this is the cable you sent to your Bombay office on February 2nd? [332] A. Yes, this is.

197

Mr. Abrams: That is already in evidence. I would like to call it to your Honor's attention. There are so many exhibits.

Mr. Hyman: Yes, we had that. All right, go ahead.

Q. And did you also send this cable, Petitioner's Exhibit 43, to your Bombay office on February 9th? A. Yes, I did.

Mr. Hyman: That is already in?

Mr. Abrams: Yes, that is already in.

Mr. Hyman: I have seen that No. 43. Incidentally, if it was received as testified to by

198 Mr. Munakata, evidently it was sent.

Mr. Abrams: I am only trying to build up the picture, the continuity.

Mr. Hyman: The trend of thought?

Mr. Abrams: That's right.

Q. Did you receive this cable from your Bombay office on February 10th? A. Yes, I did.

Q. And were you unable to accept that bid because it called for delivery in April or May? A.

Yes. This information was immediately transmitted to Hardy and Hardy rejected it because—

[333] Q. Of the dates? A. —because of the date itself.

Mr. Abrams: I offer it in evidence.

Mr. Hyman: Have it marked Petitioner's Exhibit 56 in evidence. Hardy eventually did buy this type of ore for delivery in May?

Mr. Abrams: But wouldn't do it for us.

Mr. Hyman: Not from Iida.

Mr. Abrams: He wouldn't accept it from Iida. Hardy has explained to us and we can 200
have Mr. Odell testify that their customer was the U. S. Steel. United States Steel insisted on delivery January, February and March. When they found they could not get it for January, February or March, eventually they came around and accepted a later delivery. Eventually, you remember, Mr. Fricke testified they accepted later delivery at Baltimore. But they wouldn't accept later delivery——

Mr. Hyman: They later changed their mind.

Mr. Abrams: Yes. U. S. Steel changed its mind and therefore Hardy was able to fulfill its contract with U. S. Steel. 201

(Cable dated February 10, 1955, from Iida New York to Iida Bombay, was marked Petitioner's Exhibit 56 in evidence). (p. 185 record).

[334] Mr. Hyman: Was this cable sent from the New York office?

Mr. Abrams: From Bombay to New York Kato got information on this as to April and May, and he explained in his answer, he went to Hardy and Hardy said no, they can't take April or May.

Mr. Hyman: It is apparent Iida was prepared to pay $45 or $44 to fulfill its contract with Hardy if Hardy would accept May shipment.

Mr. Abrams: That's right.

Q. Did you have any meeting with the Hardy officers about February 15th? A. Yes, I did.

203

Q. Where was this meeting? A. Mr. Rodney, Mr. Tamaru and myself, the three of us met at the office of Hardy & Company.

Q. At 141 Broadway, New York City? A. Yes.

Mr. Abrams: For the record, Mr. Tamaru is the president of Iida & Company.

Mr. Hyman: He is here in New York?

Mr. Kassel: He is sitting right here (indicating).

Mr. Abrams: That is Mr. Tamaru.

Mr. Hyman: How do you spell his last name?

[335] Mr. Abrams: T-a-m-a-r-u.

204

Q. Whom did you deal with at Hardy & Company? A. Mr. Fricke and Mr. Odell.

Q. Did you ask them whether they had been able to procure the floating cargo about which Mr. Rodney had explained to you previously? A. Yes, I did.

Q. What did they tell you? A. They said that they weren't able to obtain that floating cargo. 205

Q. Was there any talk about their trying to replace the cargo elsewhere? A. Hardy themselves said that they had some possibility that they knew about, but they didn't go into detail as to where or what price or any matter.

Q. Was there any discussion about paying for the difference between the contract price to Hardy and what Hardy would have to pay for the ore? A. Yes, there was.

Q. What was the arrangement or the discussion on February 15th at Hardy's office? A. We informed Hardy that if the difference between [336] the contract price and the ultimate price that Hardy would have to pay was reasonable, that is, if Iida considered it reasonable, Iida would be willing to pay that money. We discussed further about what would be the reasonable amount. 206

Q. What was the discussion about the reasonable amount? A. We discussed and finally came to agreement that perhaps up to $8.50 was the reasonable amount and we agreed on that point.

Mr. Hyman: You mean the reasonable amount of the excess over the original agreement?

The Interpreter: That's right. 207

Mr. Hyman: Ask the witness. You said that.

The Interpreter: I am sorry. I mean, he said that. I thought it was understood and I didn't translate that part.

Mr. Hyman: Translate everything.

A. (Continued) By $8.50, I meant that we would be willing to add $8.50 to the price that we sold.

Mr. Hyman: In adding to the price, they are not paying $8.50 a ton more to the purchase. That is what he said they agreed would be the amount of damage and that would be the amount that Iida [337] would pay Hardy for failure to deliver.

The Interpreter: Yes.

Mr. Hyman: That is a different story than saying, add to the price.

209 The Interpreter: Maybe I stated it wrong that way.

A. (Continued) $8.50 would be the amount which Iida would have to pay over the——

Mr. Hyman: The contract price.

A. (Continued) —the contract price.

Mr. Hyman: To Hardy & Company?

The Witness: To Hardy & Company.

* * * * * *

Q. You agreed—you arranged with Hardy &
210 Company [338] on February 7th to make good the difference on the replacement ore as evidenced by your letter of that date, Exhibit 55, is that correct? That calls for a yes or no.

Mr. Hyman: I will have to insist that he answer yes or no. It is so or it is not so. Let him look at the letter.

A. Yes, it is, except by making good on the difference, there was a limitation on the price that Hardy would pay, and it would have to be limited to $44.50.

Q. And that arrangement was set forth in the letter or statement dated February 17th and it was reduced to writing, Exhibit 31, is that correct? A. Yes.

Q. On February 17, when Exhibit 31 was signed, did you go to Hardy & Co. with this check for $30,000, Exhibit 32? A. Yes. Immediately after signing, this check was handed to them.

212

Mr. Hyman: It states: "Pursuant to letter agreement dated February 17, 1955."

Q. The letter agreement, Exhibit 31, provides that a letter of credit be given to Hardy for the balance of $34,600 by February 23rd. Did you on February 23rd give this letter of credit, Exhibit 33, to Hardy?

[339] Mr. Hyman: Just answer yes or no.

A. Yes.

213

Mr. Hyman: By February 17th, had it already been determined that the market price that Hardy would have to pay would be at least $44 a ton?

Mr. Abrams: $44.50.

Mr. Hyman: $44.50. Just yes or no.

The Witness: Yes.

Mr. Hyman: Did Hardy & Company tell you that they had found a cargo and found ore which could be purchased at $44.50 and at

no lower price—identical with the grade and quality of the ore which was the subject of this contract?

The Witness: Hardy & Company did not say that they had the supply of ore in hand, but that there was one definitely available. They said they would have to pay at least $44.50. They said they might have to go over $44.50, but that was the price agreed on.

Mr. Hyman: Well, at that time, did Hardy & Company tell you that the market value already was $44.50 or higher?

215 The Witness: Yes.

Mr. Hyman: Did you make any inquiry in the [340] market itself to establish whether any such ore at that time could be purchased for less than $44.50?

The Witness: I asked Mr. Rodney to make that investigation.

Mr. Hyman: Did they get any answer to that investigation?

The Witness: Yes.

Mr. Hyman: What was it?

The Witness: Mr. Rodney informed me that it was completely impossible to obtain any ores in the market and in fact, Mr. Rodney stated that perhaps the ores Hardy &
216 Company had mentioned earlier, that is, the floating cargo, would probably have been the cheapest and least expensive ores available.

Mr. Hyman: And what was that?

The Witness: As I stated before, the price then was assumed to be around $44. This was around February 3rd.

Mr. Hyman: Was the market still rising?

The Witness: It was a very firm market.

Mr. Hyman: Was it static or was it rising? Was it breaking or not?

The Witness: Well, it was slightly going upward, [341] but very slowly.

Mr. Hyman: I am sorry to interrupt you, but go ahead.

Q. This floating cargo to which the various cablegrams in evidence this morning refer to, the upshot of it was that the cargo could not be procured, is that right? A. Yes.

Q. When you say it was impossible to procure ores of the same specifications, you mean for January, February and March delivery, pursuant to the Hardy contract? 218 A. Do you mean the floating cargo that was not available, or do you mean any replacement?

Mr. Abrams: I will withdraw that. He has already testified to it. I will withdraw it.

Mr. Hyman: Yes. I want to be enlightened on this. He said Rodney informed him that the market price was $44 or $44.50. That indicates that some ore was available for April and May delivery at that price.

Mr. Abrams: They weren't interested at that time for May delivery.

Mr. Hyman: They wanted January, February and [342] March delivery, but there was none available at that time. He asked the Hardy & Company would they accept May delivery and Hardy & Company said no, but Hardy & Company did go out and got their own May delivery and price, and the May delivery was $44.50 a ton. 219

Mr. Abrams: $44.50 or $44.75 a ton?

Mr. Hyman: I also want to know this: if the later the delivery and the more time that the seller had to deliver the ore, the easier would be the price and the shorter the terms of delivery, the higher would be the price, if any were available?

Mr. Abrams: Because of scarcity.

Mr. Hyman: That is elementary economics.

Mr. Abrams: Shall I ask the question?

Mr. Hyman: Read my question back.

(The pending question was read by the reporter.)

221 The Witness: Yes, that would be correct.

Mr. Hyman: All right, go ahead. Answer the question.

Q. Did you keep in touch with Mr. Rodney or Mr. Odell as to what success they were having in replacing the cargo? A. Yes.

[343] Q. And did you finally hear, near the end of March, from Mr. Odell about the replacement of the cargo and the price of the replacement? A. Yes. I made a telephone call to Hardy and was told by Mr. Odell about that.

Q. That is, that they got the cargo at $44.50? That is, they got the replacement cargo at $44.50, is that right? A. Yes, but actually the $44.50
222 per ton is the average price.

* * * * * *

[344] Q. As a result of the cancellation by Devidayal, did you incur telephone and cable charges, and if so, in what amount? A. The cable and overseas telephone expenses incurred after the cancellation of the contract totals about $1,170.67.

Mr. Abrams: Let it be noted on the record [345] that the interest on the $30,000 paid to Hardy & Company on February 17th computed just to June 17th for the moment, amounts to $600.

Q. What were the bank charges on the letter of credit furnished to Hardy on February 23rd? A. It was one-eighth of a percent of the letter of credit, which is $43.25.

Q. You brought Mr. Munakata over from Bombay at our request to testify at this proceeding, is that right? A. Yes.

Q. And he is to return to Bombay after the conclusion of this proceeding to resume his duties there? A. Yes.

Q. What was the cost of Mr. Munakata's airplane round trip ticket? A. $1,152.27.

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[347] *Cross-examination by Mr. Naidich.*

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[401] Q. I direct your attention to Exhibit 55.

Mr. Hyman: What is that exhibit?

Mr. Naidich: That is the letter from Iida to Hardy dated February 7th, I believe.

Mr. Kassel: February 7th is right.

Mr. Hyman: February 7th, 1953?

[402] Mr. Kassel: 1955.

Q. I quote from your letter: "Your indication of $44 per ton CIF Mobile discharge included, appears high." A. Yes, I see that.

Q. What was your basis for that statement? A. Well, there were two reasons. One, was to

minimize the damage or loss on our part and to quote it as low as possible.

Secondly, on February 2nd or 3rd, we were informed by Benjamin Schwartz that they may be able to find a replacement at $44, and since they quoted the price of $44, I thought perhaps they could buy it a little cheaper than that. So I wrote this in for any price lower than the price they quoted.

Mr. Hyman: Well, did you put this figure in in order to limit the damages? Is that
227 what you are trying to tell us?

The Witness: That was the most important reason for putting this clause in.

Mr. Hyman: All right.

Q. Now, you testified on direct examination that [403] you were unable to replace the ore at any price for January to March shipment, is that correct? A. Yes, I did.

Q. Did you make any attempts to get the ore for April or May shipment? A. Yes, I did.

Q. I believe you also testified that Hardy did not consent to an extension of the shipping date, is that correct? A. That is correct.

Q. Why did you bother looking for ore for
228 April to May shipment? A. I continued the effort to find a replacement because if I was able to present Hardy with a replacement of certain qualities, actually present him with the goods, then Hardy might be able to negotiate with an ultimate buyer of this ore in extending the shipment.

Mr. Hyman: Extending the time of the shipment?

The Witness: Extending the time of the shipment. At least, that was my desire and hope, and based on that hope, I exerted my efforts in finding a replacement.

* * * * * * *

[409] *Redirect examination by Mr. Abrams.*

Q. The deal with Hardy was completed and agreed upon on December 2nd, was it not? A. Yes.

Q. And it was only the execution of the formal contract that was deferred for Mr. Munakata's signature? A. Yes. 230

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[424] *Recross-examination by Mr. Naidich.*

Q. You stated that the contract with Hardy was consummated on December 2nd, but that Mr. Munakata's signature was deferred until the document could be mailed to him, is that correct? A. Yes, that is correct.

Q. Why was the contract signed by Mr. Munakata? A. This was because the offer had been obtained in Bombay and communication of Bombay to New York had been done by cables mostly. There was always a chance of a mistake made in the cable or made even by the telegraph office. 231

It was to make sure that such mistakes were not [425] present, that mistakes were not present and that the signature was obtained from Mr. Munakata on this contract. It is also true that the terms of the offer cannot be stated in cables in minute details. It was also to check this point that the contract was signed, was sent to Mr. Munakata for his signature.

Q. Were you aware of the fact that any contract had been signed with Devidayal at the time you closed the deal with Hardy? A. I was under the impression that the contract had been consummated with Devidayal.

* * * * * * *

[428] *Redirect examination by Mr. Abrams.*

Q. Mr. Kato, how much did you pay Benjamin Schwartz & Company in settlement of any obligations from you to him under the Hardy contract and arising out of the Hardy contract? A. $1,000.

233 Q. What did Benjamin Schwartz & Company do for you besides acting as broker? Did they do anything in connection [429] with the ore cargo? A. Benjamin Schwartz & Company cooperated with us fully in looking for a replacement.

Mr. Hyman: What he means in plain English "they spent time and spent effort in the market trying to get replacement for the ore that Devidayal failed to send."

The Witness: Yes.

Q. And did Benjamin Schwartz & Company ask you to compensate them for their time and efforts in that direction? A. No, they did not.

234 Q. I show you this letter and ask you whether you received——

Mr. Hyman: Wait a minute. They didn't? Why did you pay him for that?

Q. I show you this and ask you whether you received that letter on or about March 4th from Benjamin Schwartz & Company? A. Yes, I did.

Q. Was your previous answer that Benjamin Schwartz did not ask you to compensate them, correct? A. No, that would be my mistake.

Q. Then Benjamin Schwartz did ask you to compensate [430] them? A. Yes.

Mr. Abrams: I offer it in evidence as Petitioner's Exhibit No. 57.

Mr. Hyman: All right, mark it Petitioner's Exhibit 57. Am I right?

Mr. Abrams: You are right.

(The letter from Benjamin Schwartz to Iida, dated March 3, 1955, was marked Petitioner's Exhibit 57 in evidence) (p. 186 record). 236

Q. Did you pay Benjamin Schwartz $2,750?

Mr. Hyman: I think he already testified he paid a thousand dollars.

Mr. Abrams: I withdraw the question.

Q. As a result of negotiations with Benjamin Schwartz, did you reduce their claim to a thousand dollars?

Mr. Hyman: It has been so testified before. They settled for a thousand dollars. That means, whatever they asked for was reduced to that amount. 237

Q. Did you send this letter to Benjamin Schwartz on April 12th? A. Yes, I did.

Mr. Abrams: I offer it in evidence.

Mr. Hyman: All right, mark it Petitioner's [431] Exhibit 58.

(Letter from Iida to Benjamin Schwartz, dated April 12, 1955, was marked Petitioner's Exhibit 58 in evidence) (p. 187 record).

Q. Did you subsequent to May 2nd, give this check for a thousand dollars to Benjamin Schwartz?

Mr. Hyman: I think that was testified to previously.

239 Mr. Abrams: I have the check itself that I want to offer. That is the only reason.

A. Yes, we did.

Mr. Abrams: I offer it in evidence as Petitioner's Exhibit 59.

Mr. Hyman: All right, Petitioner's Exhibit No. 59, the check of Iida Company to Benjamin Schwartz.

(The check from Iida & Company to Benjamin Schwartz dated May 2, 1955, was marked Petitioner's Exhibit 59 in evidence) (p. 188 record).

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Mr. Hyman: What is the date of that check, please?

Mr. Abrams: May 2, 1955.

Q. Did you send this letter to Mr. Jablonka on March 22, 1955? [432] A. Yes, we did.

Q. Is Mr. Jablonka the third party mentioned before in connection with Benjamin Schwartz? A. Yes.

Q. He is the man who procured Hardy & Company and introduced him to Benjamin Schwartz, is that correct? A. Yes.

Mr. Abrams: I offer it in evidence as Petitioner's Exhibit No. 60.

Mr. Hyman: Mark it in evidence as Petitioner's Exhibit No. 60.

(Letter from Iida to Mr. Jablonka, dated March 22, 1955, was marked Petitioner's Exhibit 60 in evidence) (p. 190 record).

Q. And on March 22 did you issue this check 242
for $1,000 to Mr. Jablonka? A. Yes.

Mr. Abrams: I offer it in evidence.

Mr. Hyman: Mark it Petitioner's Exhibit 61.

(The check from Iida to Karel A. Jablonka, dated March 22, 1955, was marked Petitioner's Exhibit 61 in evidence) (p. 190 record).

Q. Did Mr. Jablonka perform any services in trying to replace the cargo? [433] A. Yes, he did.

Q. And your payment to Mr. Jablonka was for services rendered by him in that connection, is that correct? A. Yes. 243

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[499] W. N. CHADHA, called as a witness by the respondent, having been first duly sworn by the Arbitrator, testified as follows:

Direct examination by Mr. Naidich.

Q. What is your name? A. W. N. Chadha.

Q. Will you please give us your address here in the United States? A. 45 Tiemann Place, New York City.

Q. Will you please tell us what you are doing here in the United States at the present time? A. I am doing research in the field of interna-
245 tional [500] marketing.

Q. Where? A. At Columbia Graduate School of Business.

Q. Are you a candidate for any degree? A. For a Ph.D., Doctor of Philosophy.

Q. In what? A. In International Marketing.

Q. Do you hold any degrees at the present time, sir? A. I hold a Bachelor of Science in Chemistry Major, a Bachelor of Law, a Diplomate in Management, equivalent to M.S.

Mr. Hyman: Where did you get your Bachelor of Science degree?

The Witness: Gordon Mission College,
246 Rawalpindi, Western Pakistan.

By Mr. Hyman.

Q. Where did you get your Bachelor of Law degree? A. S. D. College, Kanbur. The Diplomate in Management from Imperial Institute of Sugar Technology.

Q. Did you say sugar? A. It is a Diplomate in Industrial Management.

Q. Did I hear you say sugar? A. Yes. The Institute is run by the Government of India for the education of management.

[501] Mr. Hyman: They don't have it for manganese ore?

The Witness: They have a little chemistry that has to do with manganese ore.

By Mr. Naidich.

Q. Have you had any business experience in the field of minerals and metals in India? A. Yes.

Q. Will you please tell us the extent of your experience? A. General manager of Great Indian Exports, Ltd. 248

Q. Where is that located? A. Calcutta.

Q. Any other positions? A. The immediate past position was personally with the Universal Exchange Corporation.

Q. Where is that located? A. Calcutta.

Q. Did you have any other positions in the mineral and metal spheres in India? A. I was before that the sales manager for another corporation for three and a half years, but their main fields were not minerals and metals.

Mr. Hyman: Incidentally, how old are you? 249

The Witness: Thirty-two years.

[502] Q. Did you have any connection with the Devidayal Sales, Ltd.? A. No.

Q. Have you had any connection with them? A. I have known them as a reputed shipper.

Mr. Hyman: He means, reputable.

The Witness: A reputable firm.

Q. Have you had any business relationship—by that I mean employed by them or held any positions with them? A. Never.

Q. Have you ever been employed or held any position with Iida? A. No.

Q. Are you related familywise with any members of the firm of Devidayal Sales, Ltd.? A. Not at all.

Q. Now, in connection with your experience with minerals and metals, have you ever had any dealings, specifically with manganese ores? A. Yes.

251 Q. In what capacity did you deal in that metal? A. As seller.

Q. Have you ever had occasion to draw contracts [503] for the sale of manganese ore? A. Quite a number of them.

Q. Have you ever had occasion to handle a deal with a letter of credit in connection with the sales of manganese ore? A. Yes, I did.

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[514] Mr. Naidich: While under the contract, Devidayal was not or did not have to make any shipment at least until March 31st. They didn't have to ship one ounce of manganese ore. I would like to probe the reason
252 why that might have been advantageous to Devidayal.

The Witness: Devidayal could have covered another stock at a lesser price in the month of March itself.

Q. You mean, in other words, Devidayal could have obtained ore as late as March at a lower price [515] than they could in February?

Mr. Hyman: If the market was going up, they could have paid more.

The Witness: They were deprived of the privilege of the seller, or at an option, to ship the material when it suits them, in the market.

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[533] Did you have occasion to contact the market at that time for January, February and March shipments?

The Witness: Sir, I have been in constant touch with business back home because I am now publishing a book in marketing Indian minerals. 254

Mr. Hyman: You may be, but the question is whether you specifically made inquiries in the market concerning the purchase of manganese ore of 46-48 per cent quality with phosphorous content .15 or .18 for January, February or March shipment. Did you have any occasion to inquire specifically for that type?

The Witness: In January and February inquiries were made.

Mr. Hyman: All right, January and February. The time of the failure to get delivery is the time that the buyer says he was forced to go into the market. That would be January, February and March. 255

The Witness: I have been in constant touch [534] all these months. Even now, I am in constant touch with all the shippers there and the prices prevailing, and the market conditions.

Mr. Hyman: Did you buy any yourself at that time?

The Witness: No, but I kept track of it.

Mr. Hyman: Did you try to buy any?

The Witness: Yes, I did.

Mr. Hyman: Did you succeed in buying any?

The Witness: No, because I could not sell it here. I could buy plenty. The question was, if I had a suitable sale here.

Mr. Hyman: All right. Don't let me interrupt you further.

Mr. Naidich: I would like to know, sir, if you feel that his qualifications and the information that he has just given you——

257 Mr. Hyman: I will take it for what it is worth.

Mr. Naidich: Will you please read the question?

(The pending question was read by the reporter.)

A. You can always get manganese if there is two or three months' time for shipment. .18 per cent phosphorus is not exceptionally good quality that it could not be obtained. If it is .18—actually, any [535] high grade is sold higher than .18.

Q. Therefore, in your opinion, this is not such
258 a scarce commodity? A. Not at all, when you have two or three months' time.

Q. Is two or three months' time for shipment considered a long time or a short time? A. It is sufficient time to honor a shipment. It may not be enough time to make an extraordinary operation.

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[557] AMIRCHAND T. GUPTA, called as a witness by the respondent, having been duly sworn by the Arbitrator, testified as follows:

Direct examination by Mr. Naidich.

Q. Will you please state your full name? A. Amirchand T. Gupta.

Q. Will you please tell us where you are residing at the present time? A. Savoy Plaza.

Q. The Savoy Plaza Hotel? A. Yes.

Q. What is your association with Devidayal (Sales) Ltd.? A. I am managing director of Devidayal (Sales) Ltd. 260

[558] Q. What are your duties in connection with that position? A. See the business and control the business.

Q. Do you have any dealings in ores and metals in that position? A. Yes.

Q. Specifically, did you have occasion to handle the sale of manganese ores? A. Pardon?

Q. Do you handle the sale of manganese ores? A. Yes.

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[564] Q. Did Mr. Munakata ever tell you whom he was intending to resell this ore to? A. He was telling me he was negotiating with New York.

Q. Did he mention the name of any firm? A. 261 I don't actually remember it.

Q. Did he tell you the price at which he was intending to resell the ore? A. No.

Q. Did he ever tell you that Hardy & Company was going to be the repurchaser of this ore? A. No, I don't remember.

Q. Just a New York firm? A. A New York firm.

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262 *Amirchand T. Gupta—For Respondent—Direct.*

[598] Q. Now, referring back to January 6, 1955, when you wrote your letter, Petitioner's Exhibit 21 to Iida [599] declaring the contract cancelled, did Mr. Munakata communicate with you subsequently to that date concerning this contract? A. Yes.

Q. Did he come to see you? A. Yes.

Q. And wrote you several letters, is that correct? A. Several letters, yes.

Q. What was your position concerning the contract, concerning the letters that he wrote to you?

263 Mr. Hyman: When?

Mr. Naidich: Subsequent to January 6th.

Mr. Hyman: You don't want to fix any particular date?

Mr. Naidich: It is very difficult. Let me withdraw that question. It will be better.

Q. It has been testified by Mr. Munakata that he saw you on January 18th and discussed the shipment of manganese ore. You remember that occasion? A. Yes, sir.

Q. Will you please tell the Arbitrator what transpired at that time? A. Regarding what?

Q. What Mr. Munakata stated to you and what did you say to him? [600] A. On the 18th of
264 January?

Q. That's right. A. He wanted us to supply the material and I told him that the letter of credit is not good as to the particular terms of the contract: You have failed to fulfill the terms of the contract. The contract is closed on the 6th of January.

Q. Did you make any offer to renegotiate with him at that time? A. I told him that I can any-

how supply under new terms and conditions, if you pay me $2.00 more. 265

Q. This $2.00 increase, was that the then current market price for the ore? A. That was my demand at that time and it was the current market price.

Q. What did Mr. Munakata say when you made that statement to him? A. He offered me one dollar back.

Q. What was your—what did you say in response to that? A. I told him, "No."

Q. Did Mr. Munakata at any time subsequent to that make any offers to you for the purchase of the ore? A. No. 266

[601] Mr. Hyman: This is January 18th, which you are referring to?

Mr. Abrams: That's right.

The Witness: Yes.

Mr. Hyman: Was the price going up at that time, Mr. Gupta, in manganese ore for this quality?

The Witness: By the 18th he approached, the prices were near about this price.

Mr. Hyman: They had gone up from what they were in December?

The Witness: It was near about $25.25 or $25.50. 267

Mr. Hyman: Was this manganese ore readily available in the market, or was it becoming increasingly more difficult to get this ore?

The Witness: There was plenty of material available.

Mr. Hyman: You say there was plenty?

The Witness: Plenty of material.

Mr. Hyman: With the price going up?

The Witness: The price was going up. That was on the demand and supply.

Mr. Hyman: I mean, the more supply, the lower the price would be?

The Witness: Yes.

[602] Mr. Hyman: The less the supply, the higher the price would be?

The Witness: The demand was going up.

Mr. Hyman: The market was going up?

The Witness: Yes, because the French people were coming in for buyers.

Mr. Hyman: The French people?

269 The Witness: Yes.

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[618] Q. Why did you want to have the right to make one shipment as late as March? A. Because it was more comfortable.

Q. It was easier for you to supply? A. Yes.

Mr. Hyman: It is obvious, if he could not make delivery in installments in January and February, he would still have March within which to fulfill the contract.

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[629] *Cross-examination by Mr. Abrams.*

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[659] *By Mr. Abrams.*

Q. Mr. Gupta, you are familiar, of course, with the market in India in manganese ore? A. Yes, sir.

Q. Wasn't the market price rising steadily from [660] December right through the end of March, 1955? A. December?

Q. From December, about December 8th or December 6th. Wasn't it rising steadily from then on to the end of March at least? A. Yes, the market was steady.

Q. What do you mean by steady? Was it going up? A. It was steady and firm.

Mr. Hyman: He already testified he means it didn't go up and didn't go down. Steady means steady. I don't know any other definition. Maybe I am in error in interrupting him, but by steady I think he means it didn't go up and didn't go down. 272

Q. Do you mean by steady that the market price didn't go up and did not go down, but remained the same? A. No, it went slowly up.

Q. What do you mean by steady? A. Steady, slow.

Q. A slow rise? A. A slow rise.

Mr. Hyman: That is not steady. Steady in my language means it remains the same, it is not going up and it is not going down. There are only three [661] ways it can go. It can go up, and go down, and stay the same way.

The Witness: We interpret it in the language of the market, the market is steady. 273

Mr. Hyman: You mean, it goes up steadily? I think what the witness really means—let us be fair to him—is that the market was free from erratic movement, erratic fluctuations up and down like our market here does. He means it was steady with a constant increase proceeding all the time.

Q. In other words, there was a steady rise in the market? A. Yes, sir.

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[664] I might also say, for the guidance of both counsel, in an effort to shorten it, that Exhibit H (showing published market prices of manganese ore—not printed in record) introduced by respondent shows a steady and definite increase upward from December 2nd in the price of this ore, and that the rise was quite substantial. So, I don't think there can be much controversy on that issue.

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[676] Q. You canceled the contract with Devidayal on January 6th, is that correct? [677] A. Yes.

Q. Did you subsequently sell that 8,000 tons of ore? A. We did sell it.

Q. At an increase in price? A. After what?

Q. Of $2 from the price you sold it to Iida? A. We sold it, sir.

Q. At an increase of price? What price did you sell it for? A. It was, in some cases, a half a dollar, in some cases, one dollar, and in some cases $1.50.

Q. In some cases $2? A. No.

276

Q. Never $2? A. Up to $1.75.

Q. When did you sell that? A. It was in the middle of December——

Q. When? A. It was the middle of January. In the middle, sir.

Q. It was within ten days after you canceled the contract? A. Ten or fifteen days.

Q. You still had that ore on hand on January 18th when you spoke to Mr. Munakata? [678] A. Surely.

Q. And you asked him for $2 increase then? A. Surely.

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[688] Q. So, you did know on December 4th, when you sent this telegram, Exhibit 8 (not printed), that Iida was reselling to Hardy & Company, is that correct? A. Yes.

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278

[779] J. R. Odell, called as a witness in behalf of the Petitioner, having been first duly sworn by Albert Glotzer, Notary Public, testified as follows:

Direct examination by Mr. Abrams.

Q. What is your address and full name? A. J. R. Odell, O-d-e-l-l. Joseph Robert Odell.

Mr. Naidich: How do you spell your name?

The Witness: O-d-e-l-l. 627B Shaler Boulevard, Ridgefield, New Jersey.

279

[780] Q. You are connected with the firm of M. W. Hardy & Co.? A. Yes, I am.

Q. Are you an officer of that corporation? A. Yes, I am vice-president.

Q. You deal in manganese ores? A. Yes.

Q. How long have you been engaged in the business of dealing in manganese ores? A. Five years with M. W. Hardy & Company.

Q. And before that? A. Before that, actually I was—I came to the United States in 1948, you see, and the first two or three years in this country I devoted myself to the study of metallurgy and mineralogy.

Q. Did you have occasion to buy and sell manganese ore very frequently? A. Yes, I did.

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[790] Q. Now, when you first found out that Iida would be unable to deliver the ore sold to you— A. Wait a minute. That contract provides for January and February.

281 Q. January, February and March. [791] A. I think we found out before the end of January. We tried to replace 2500 tons for January and February——

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[793] Q. How did you try to replace the ore? A. We contacted all our regular suppliers of manganese ore in order to obtain the full quanity in this contract. First, we started off with 2500 tons, because they failed on the January shipment. Then, Mr. Francis——

Q. Rodney? A. Mr. Francis Rodney, he called me over the telephone and he said he was going to make his own efforts. Then, he didn't succeed.

282 Then, the whole thing came to a culminating point some time in March.

We had the declaration that they can't perform and we started these negotiations. Then, I went all out to cover the full quantity of this contract.

Q. You say you had Iida's declaration in March. Was it March or February? A. I don't know.

Q. We have a letter dated February 17. A. I don't remember exactly the date.

Q. Tell us specifically what you did to try in January and February? What did you do to try to replace that 8000 tons? A. Well, I met myself a lot of people they had contacted.

Q. Will you give us the names of the people you [794] contacted? A. I didn't only try to buy in this quantity from Indian sources, but also tried to buy from New Caledonia, which supplies identical ore.

But at that time, the quantities which we needed were not available, on account of our suppliers having contracted—were under contract to other buyers. 284

Then, we also had a little bit of difficulty in obtaining ships to ship the merchandise, say to India, we then had to make a compromise with Associated Metals and Minerals and Sohanlal Pahladrai.

Q. Will you give us now names of people you contacted, first in New York, in trying to replace this tonnage? A. Well, in New York, we contacted only Associated Metals and Minerals, because they were about the only people who could make a contract for 8000 tons.

Q. What did they tell you in January and February? A. Well, I think we had to leave this matter in their hands almost for fourteen days to cover our contract. It was at least fourteen days before we knew the decision of their acceptance. 285

Mr. Hyman: When did you first try to get the replacement?

[795] The Witness: I can't give you exactly the date.

Mr. Hyman: Have you any record of efforts you made, and the dates you tried to contact people?

The Witness: The only people who could help me on the dates is Mr. Rodney.

Mr. Hyman: He won't help you. If he wants to testify, he will testify himself.

The Witness: Well, frankly, I don't remember the date. It was about a week before we came finally to a showdown with Iida.

Q. What you call a final showdown. A. The
287 date on which we made a definite agreement.

Q. The definite agreement which is an exhibit in this case, the letter of February 17? A. Yes. So, that must have been February 10, when we tried to cover the whole 8000 tons, and this preliminary work allowed us to make the agreement of February 17th with Iida, because, then I investigated the market thoroughly. We knew the prices and we knew the parties covering this particular contract.

Mr. Hyman: What exhibit is that, February 17th?

Mr. Kassel: Petitioner's Exhibit 31.

Mr. Hyman: The witness, in referring to
288 the agreement of February 17, 1955, refers to Petitioner's [796] Exhibit 31.

Mr. Kassel: Yes, Exhibit 31.

The Witness: I think it should be added that actually, in making this agreement, we ourselves took a big risk on our shoulders.

Q. In what way did you take a risk? A. Inasmuch as we have great difficulties to cover this

contract. Secondly, on some of the items, we bought at a higher price than we actually originally agreed with Iida to buy, and which reflected in our own price.

Q. In other words, under this settlement agreement with Iida, Iida was obligated to stand the cost of replacement up to $44.50 a ton? A. Correct.

Q. If you had paid more than that, it would have come out of your own pockets? A. Out of our own pockets.

Q. You had to pay $44.75 for some of the tonnage? A. Right. 290

Q. Will you read into the record the names of people in India whom you contacted in trying to replace this tonnage?

Mr. Hyman: I assume it is for manganese ore of the same qualities, with a phosphorous content [797] of .15 and .18.

The Witness: .15. But, may I say, you see, at that time, the manganese ore market advanced to such a degree, where especially in February it had advanced to such a degree, we would have taken anything.

Mr. Hyman: You would have taken anything?

The Witness: .18. 291

Mr. Hyman: I understand .15 and .18 had some different quality.

Q. You mean, you would have taken .18 phosphorous, without any question? A. Yes.

Mr. Hyman: All right, go ahead.

A. (Continued) J. A. Trivedi Brothers, Balaghat M. P., Eastern Railway, India; Pacific Minerals, Ltd., 16 Hare Street, Calcutta 1, India; Rai Bahadur Shreeram Durgaprosad Ltd., Tumsar, India; M. S. Leconte, Voli, New Caledonia; Hariram Dinanath, J2 Marnari Bazar, Bombay 2, India; Gird Hariral Vishnukumar Agrawal, P. O. Box 130, Cidade De Goa, Portuguese India.

* * * * * *

[802] Q. Do you know what the market price of ore of this quality was for 8000 tons for February to March delivery, when you tried to re-
293 place it late in January and early in February? A. The price was $32 a long ton f.o.b. vessel.

Q. It would go to charter Mobile? A. $32 would be to go to Mobile, rather than $45 or $46 Mobile.

Q. Were you able to place any contract for February and March delivery at Mobile of ore of this quality? A. Hardly impossible.

Mr. Hyman: You say hardly impossible?

The Witness. Highly impossible. That was one of the items, you see, in covering our requirements [803] with Associated, that they were in a position to deliver to us 2000 tons for Mobile discharge.

294 Q. How long would it take to get 8000 tons ready for shipment? A. You are speaking from the mine to ports of loading?

Q. In other words——

Mr. Hyman: I think the witness puts the proper question. Do you mean from port to port or from the mine to the port of loading?

Mr. Abrams: To get ready for shipment. I don't mean for delivery.

Mr. Hyman: Wouldn't it depend on whether the ore was available at the docks, whether it was in the mines, whether it was on trains in transit? Sometimes contracts may be made and picked up with the load on the way, while it is absolutely in transit.

The Witness: Well, I would say from mine to port, you need a good two months or two and a half months to get the ore loaded on railroad cars and take it down to the port of loading. 296

Mr. Hyman: When you say mines, you mean mines in India?

The Witness: Mines in India, down to the port of loading. The loading itself of 8000, on the [804] basis of 8000 tons, you want approximately eight to nine days, provided you have no rainy weather and straightforward working days. From Bombay to Mobile or to Baltimore, you have approximately five to six weeks.

Q. Mr. Odell, when you made these efforts in January and February to procure ore, could you get any ore of this quality for February and March delivery? I think that is what he said, highly improbable. Is that correct? A. Yes. 297

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[805] *Cross-examination by Mr. Naidich.*

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[810] Q. Now, I believe you testified that you tried to replace ore they had contracted to sell you

under Petitioner's Exhibit No. 30, in the latter part of January. [811] A. Right.

Q. Did you make attempts to replace it through organizations here in New York? A. No.

Q. You didn't go to any brokers in New York? A. I told you before, that first, when it was clear that Iida could not ship the first 2,500 in January and so admitting in February, we tried to replace the first 2,500 tons. It is not customary on our part to buy from domestic importers. We usually buy in the international market.

At that time we only concentrated on India as
299 being our local source of supply.

Q. Well, what about your contract with Iida? Would you consider that as being or going to the initial source of supply when you contracted to buy the ore from Iida? A. This is—how shall I say—somebody comes to you with a proposition which you think is right and you buy.

Q. But you can get ore from local merchants? A. Yes, but normally I don't like to have my supply of manganese ore in the domestic market.

Mr. Hyman: Whether you do or don't, did you try to get it?

The Witness: No, I didn't in the beginning, [812] not in the beginning of Febru-
300 ary.

Mr. Hyman: The place where you call to for replacement——

The Witness: Was India.

Mr. Hyman: Was Associated Metals?

The Witness: Sir, that was our last resort.

Mr. Hyman: Was that an American company, a domestic company?

The Witness: Yes.

Mr. Hyman: You then did apply to an American company for replacement?

The Witness: In the final stage.

Mr. Hyman: But you stated a moment ago you didn't go to domestic sources, only foreign sources.

Mr. Abrams: The question was in January.

Mr. Hyman: January?

The Witness: First, Iida could not supply the January shipment of 2,500 tons.

Mr. Hyman: Yes.

The Witness: So, in February we were 302
only concerned with 2,500 tons. So, for this lot, I went to see if I could get the supplies in India or Caledonia.

In the meantime, they could not supply the [813] February lot. Then, we were really concerned that they could not supply either of these three lots.

We then went to Associated Metals. I can even give you the date when we went. We went about a week before we made the final agreement with Iida on February 17th. Then, we went to Associated for another quantity.

Mr. Abrams: That was February 10th?

The Witness: That was February 10th. 303

Q. You didn't make application to any other dealers in New York? A. No, we didn't.

Q. Why? A. Because I don't think that any of the dealers would have had quantities available which we needed to replace the contract.

Q. You didn't think they could supply it? A. No.

Q. You don't know whether they could or not? A. No. I will tell you something more. If it didn't occur to me, I wouldn't have gone to Associated. If it hadn't been for Mr. Fricke, who knew Associated——

Q. In other words, he got a bargain? A. At that time, we certainly had a bargain. We certainly had a bargain.

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[817] Q. You testified that you were attempting eventually to get replacement ore for January, February and March delivery? A. Yes.

305 Q. Delivery? A. Shipment.

Q. Not delivery? A. Shipment.

Q. Now, when you finally did enter into these contracts with Associated Metals and Pahladrai—let me see— you had it here as May loading, April 20th to May 15th loading. Here is one that is not too clear. It just says: "From any major Indian port within 69 days of acceptance, March 21, 1955."

What was meant by that? A. Within 69 days of the signing of the contract.

Q. What is the March 21st date, though? A. "Within 69 days of acceptance"—69 days from the date of the contract, which is March 21, 1955.

306 The [818] merchant has been supplied a ship ready to be paid for by the United States Steel Corporation.

Q. The date of the contract is March 22nd. From May—that is June——

Mr. Abrams: From May. The end of May.

Mr. Naidich: 69 means——

Mr. Abrams: From March 21st to the end of May. 60 days through May and 9 days in March. That is 69 days and it is the end of May.

The Witness: That merchandise has been supplied.

Q. That had to be shipped from India by the end of May? A. That is correct. That is arriving next week in Baltimore.

Q. So, therefore, you end up getting ore not for January, February and March, but later shipments? A. Yes, very much so, because you see, 308
in the meantime the market, as I said to you before, is uprising, has an uprising trend and, consequently, the buyer, instead of giving us a penalty for non-fulfillment of the contract, as agreed, that the ore be supplied for a later date. If he don't agree to supply at a later date, the contract would have cost——

Mr. Hyman: If he didn't supply? What did [819] you say about your buyer not supplying.

The Witness: Rather, the buyer, which is U. S. Steel Corporation, if we would have declared ourselves like Iida, that we can't ful- 309
fill, so, we have to settle whatever the conditions are for the cost of the ore at that time, at the time they contracted with us.

But, instead of doing this, they extended our delivery date because they wanted the ore.

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310 *Ralph R. Feuerring—For Respondent—Direct.*

[826] RALPH R. FEUERRING, called as a witness by the respondent, having been first duly sworn by Albert Glotzer, a Notary Public, testified as follows:

Direct examination by Mr. Naidich.

Q. Will you please state your name? A. Ralph R. Feuerring—F-e-u-e-r-r-i-n-g.

Q. Will you please give us your address? A. You mean the address——

Q. Where you live. A. I live at 2711 Henry Hudson Parkway.

311 Q. Riverdale, New York? A. Riverdale, New York.

Q. What is your occupation? A. I am Vice President of Ferro-Metal and Chemical Corporation.

Q. Ferro-Metal and Chemical Corporation? F-e-r-r-o? A. Yes, sir.

Q. Where is that organization located? A. 50 Broad Street.

Q. New York City? A. New York City.

[827] Q. What type of business is that? A. We are international traders in manganese, iron ores, pyrites, chrome ores.

Q. Specifically, do you deal with manganese ore
312 from India? A. We import manganese ore to this country and also ship to Europe.

Q. How long have you been in this business? A. I would have to clarify. We are actually part of an international organization with headquarters in Stockholm, Sweden.

Q. How long have you been in this business? A. I have been in this business since 1941, with a brief absence in the U. S. Army.

Mr. Hyman: What is the name of the company?

The Witness: Scandinaha Malin Och Metall A. B.

Q. You say you have been in this business since 1941 with a brief absence for Military Service, is that correct? A. Yes.

Q. Are you familiar with the market in Indian manganese ore? A. I believe I am.

Mr. Hyman: Is he familiar with it as of the time of this transaction in December?

[828] Mr. Naidich: Let me rephrase the question. 314

Q. Are you familiar with the market for manganese ore for the period of December, 1954 through March, 1955? A. I am.

Q. During that period, did you have occasion to buy and sell Indian manganese ore? A. Yes, sir, both.

* * * * * *

[844] Q. Let us say, in the middle of January, do you happen to know what the market was for manganese ore for the specifications set forth in the contract? A. Yes, I can tell you that I bought from another New York corporation, a very substantial New York corporation, 5,000 tons in the middle of January, out of which the first 2,000 tons were at $26.00 and the balance at $27.00. 315

Mr. Hyman: That is f. o. b.?

The Witness: F. o. b.

Mr. Hyman: Was that shipped under the Union Mariner?

The Witness: That wasn't shipped with the Union Mariner. I don't know about the Union Mariner.

Mr. Abrams: Shipment when?

Mr. Naidich: I will ask him.

Q. What shipment dates were these set for? A. That was for shipment in February and March. It has been shipped.

Q. What was the phosphorous content? A. .15.

Q. .15? A. Yes, and it has been shipped. This corporation is perhaps the largest importer of ore in this [845] country. I am sure they wouldn't 317 give us the ore for last year, what it was worth.

Q. Do you know whether there was any ore available for the month of January for February and March shipment? A. Yes, I just told you. But, if I would have been willing to pay a dollar more, I could have got 50,000 tons. It was a common practice.

Q. Ore was available, and it was a matter of price? A. Yes. As a matter of fact, the Indian price was higher than the buyers were willing to pay. A lot of New York firms who had bought ore previously, were willing to sell ore below the price they could replace it for in India.

The best place for anyone looking for replacing 318 ore would have been with New York corporations, rather than India itself.

Mr. Hyman: Were the New York corporations buying from the Indian market?

The Witness: Yes. These corporations that bought six or seven months before that.

Mr. Hyman: In other words, you are basing your answer that the New York corpora-

tions were a source of cheaper supply than the Indian market because the New York dealers had contracted for [846] these many months in advance?

The Witness: That's right.

Mr. Hyman: Therefore, they were in a position to undersell the Indian sellers?

The Witness: They speculated in a rising market, and when January, February and March——

Mr. Hyman: Let us go off the record.

(Discussion off the record.)

The Witness: I will tell you what it was 320
based on. The steel rate last year was abnormally low.

Mr. Hyman: The steel rate?

The Witness: The steel producing rate was abnormally low proportionately.

Mr. Hyman: 1954?

The Witness: That's right. It was 67 per cent up to the last quarter of last year. As a result, manganese prices fell to an all-time low since the Second World War and many importers, many dealers felt, as it accurately turned out, that the bottom had been reached.

The last of December—October, November and December, they bought substantial quantities. 321

I would say, that by the time December, the end of December and January came around, more ore [847] was being held by New York corporations than by Indian firms.

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322 *Karel A. Jablonka—For Petitioner—Direct.*

[849] KAREL A. JABLONKA, called as a witness in behalf of the petitioner, having been first duly sworn by Albert Glotzer, Notary Public, testified as follows:

Direct examination by Mr. Abrams.

Q. What is your name? A. Karel A. Jablonka.

Q. Mr. Jablonka, where do you live? A. 68 West 69th Street, Manhattan.

Q. What business are you engaged in, Mr. Jablonka? A. I am an independent broker in the international trade, dealing mostly in raw mate-
323 rials, metals, minerals, ores.

Q. You deal in manganese ores among other things? [850] A. Yes, I do.

Q. How long have you been engaged in that business? A. In this particular business, I would say, seven years.

Q. Now, I believe it was you that brought together M. W. Hardy & Co. with Iida, in your capacity as broker, is that correct? A. That is correct.

Q. You had a profit-sharing arrangement, you were to get a commission based on one-third of the profit on the deal? A. That is correct.

Q. Did you ever receive any commission on that
324 from Hardy & Co.? A. No, I did not.

Q. You did receive a thousand dollars from Iida & Company? A. Yes, I did.

Q. For what did you receive that thousand dollars? A. That was for my services and efforts trying to find replacement cargo when the Devidayal contract was cancelled.

Q. What did you do in trying to find replacement cargo for the 8,000 tons contracted for be-

tween Devidayal [851] and Iida? A. Well, I contacted various dealers and importers in New York, with whom I was dealing for a great many years, for various minerals and ores, and about whom I knew they had good connections and good contacts in India and elsewhere.

One of them was M. Golodetz & Company, 120 Wall Street. They have their offices in India and I believe according to what they are, one of the largest importers of Indian manganese ore in this country.

Q. Whom else did you contact? A. Then, there were various others which I contacted merely for 326
the purpose of trying to find out what the situation is in India. I tried to find out at what price eventually a replacement cargo can be replaced. One of them I knew had some dealings with Miles Metals Corporation, 150 Broadway.

Then also, I discussed the possibility of getting some manganese with C. G. Trading Company, 122 East 42nd Street. Then I know I contacted and discussed it with Mercantile Ores & Metals.

Q. Where are they? A. 595 Madison Avenue. Then, I used the particular services of a gentleman who came about a year ago from [852] Europe and was recommended to me.

I discussed prior to this the Iida contract, the 327
possibility of manganese ore and efforts to get it from India, because I understood he knows India personally and was connected with a firm in Paris and in Sweden supplying large quantities of manganese ores to Germany.

Q. What is this gentleman's name? A. Maisel.

Mr. Hyman: What is his first name?

The Witness: I can't remember exactly. I was trying to get in touch with him, but he must be either in Europe or on vacation.

Mr. Hyman: Has he an office here in New York?

The Witness: Yes. He recently joined Robin International Corporation at 11 West 42nd Street.

Mr. Hyman: Is that the outfit that runs ships to Africa?

The Witness: No.

329 Q. Did you also get in touch with Amerex Trading Co.? A. I think his own firm was under the name of Amerex.

Q. Maisel's firm? A. Maisel's firm. Then, the situation with the cancellation of the contract occurred. I was discussing with Mr. Rodney what can we do—possibly what can I do [853] to find replacement cargo.

So, I said, I contacted Mr. Golodetz. So, among others, I went to see Mr. Maisel. So, he cabled to his associates in Sweden, in Goteburg, by the name of Domeo. In a few days Mr. Maisel called me that he has an offer from Sweden of 8,000 tons of manganese.

330 Mr. Hyman: When was that? About when.

The Witness: That was the second half of January.

Q. What was this offer? A. I beg your pardon?

Q. Tell us something about this offer. A. Well, I told him: "Well, this happens to be for a very important customer of mine and we could not handle possibly the purchase if the purchase can

be arranged from India to the United States via Sweden. Why don't you cable your friends in Sweden to arrange a direct firm offer from the Indian supplier?"

Well, in a few days, in a week's time, I would say that Mr. Maisel had a cable directly from the suppliers in India and called me. He said: "I have a firm offer for you on 8,000 tons." I don't recall the shipment. I was trying to find notations—as I say, I was trying to get hold of Mr. Maisel. I wasn't [854] successful. The price was $31.50 f. o. b. Bombay.

332

Mr. Hyman: How much did you say?
The Witness: $31.50 f. o. b. Bombay.

Q. The same specifications? A. The same specifications. If I am not mistaken, it was April and May shipment. This is subject to correction, but I think it was.

Q. Who gave that firm offer? A. Now, I said to Mr. Maisel, I guess I have to disclose the name of the supplier because that deal would be taken directly and you would be compensated with a commission, which is understood. He told me that cable is from Devidayal, the offer.

333

Mr. Naidich: I am going to have to object to all this testimony. It is rank hearsay.

Mr. Hyman: It is part of the transaction he was involved in. If it is incorrect, you still have Mr. Gupta present to give us any of his recollection.

* * * * * *

It is stipulated that Mr. Gupta, Managing Director of Appellant, was present at this and all sub-

sequent hearings, and did not take the stand after Mr. Jablonka testified.

* * * * * *

Q. Did you tell him you wouldn't deal with Devidayal? A. I said, I don't think, or I am sure, my customers wouldn't consider any offer from Devidayal. So, we forgot about it. I told him——

Q. Did you have any offers from Mr. Golodetz? A. Yes, I had several offers from Golodetz. Mr. [855] Golodetz cabled innumerable times to their office in India.

335 Q. Where is Golodetz's office in India, do you know? A. Calcutta.

Mr. Hyman: I want to understand, was this figure that was quoted to you then, about the middle or second half of January?

The Witness: The second half of January.

Mr. Hyman: Was it $31.50, f. o. b. Bombay?

The Witness: That is correct.

Mr. Hyman: Go ahead. Pardon me.

The Witness: At one time, I had an offer from Golodetz at a figure and I said I am interested only in c. i. f. quotations, including discharge. On one occasion he gave me 5,000 tons. That was all January—the second half 336 of January—and also around the 20th of January, at a price. I said, I will have to get c. i. f. Whether f. o. b. cars Mobile, I would have to get a minimum of $45, he said. That was for shipment from April, May and June.

Mr. Hyman: When you say $45, do you still mean f. o. b.?

The Witness: F. o. b. cars.

Mr. Abrams: Mobile, he said.

[856] Mr. Hyman: I know. I want the record to show the cars.

The Witness: F.o.b. cars. In other words, c.i.f. Mobile, including discharge, $45.

A. (Continuing) Then, there was another occasion, a few days later, he offered a small cargo that was on the Calcutta shipment and there was also around—it wasn't a firm offer. He said, if it was convenient, he will work out a firm offer. He said the firm offer will be $45.50 or $44.75, if you think you can use the cargo. 338

But, we couldn't use the cargo because their specifications did not come up to our needs and the shipment was too little.

Mr. Hyman: Was this all for ore of approximately the same quality and specifications that are involved in the contract?

The Witness: That is correct.

Mr. Hyman: Exhibit No. 13?

The Witness: Right.

Mr. Hyman: This contract between Devidayal and Iida?

The Witness: That is correct.

Mr. Hyman: The contract in this case. Was [857] that phosphorus with content .18? 339

The Witness: .15 and .18. I told him we would consider both.

Mr. Hyman: The prices for that quality, was that for .15 or .18?

The Witness: .15.

Mr. Hyman: Because, it has been testified that .15 was of some superior quality to .18 and commanded a better price. What was

the variance, would you say, between the price of .18 and .15?

The Witness: Sometimes, it might be a question of 50 cents a ton or 75 cents. Sometimes, none at all. It all depends how badly they may——

Mr. Hyman: He wants the ore?

The Witness: How badly they want the ore and could use it with the remaining stock pile.

Mr. Hyman: In other words, he may waive the differential just to get the ore?

341 The Witness: That is correct.

Q. Were you able to get any of these ores for January to March shipments when you tried the second half of January? A. No, I could not.

Q. Was there any ore around the market in New York [858] in the hands of people in New York for practically immediate delivery, January to March delivery? A. Well, I checked Golodetz. He is very much up to date on what is being available on the market here and what is available in India. We could not find—they made a certain effort because I have a good connection with him—for a long period of time. He wanted to help me. He could not find anything
342 suitable there for shipment on the quality and on the price we wanted.

Q. It has been testified here—I think there is no question about it—that the market for manganese ore was rising fairly steadily from December, January, February and March? A. That is correct.

Q. Do you know the reason for this rising market? A. Well, there was—common knowledge of

everybody in this business, there were two factors responsible for the rising market.

Q. What were they? A. The manganese market was very much inactive for almost a year because the production of the steel industry was down about 67 per cent of capacity.

Mr. Hyman: When was that?

The Witness: Well, it was from the latter [859] part of 1953, almost throughout 1954, until about November.

Mr. Hyman: November, 1954?

The Witness: Right. 344

Mr. Hyman: All right, go ahead.

A. (Continuing) The industry had sufficient stocks on hand which they were using, too. During 1954, then, steel production came up to almost 90 per cent of capacity. By that time, the steel industry consumed considerable amounts of their stocks and were already in the market to make replacements.

Mr. Hyman: Was a factor to be found, if it is a fact, and that the United States Government was out stockpiling manganese ore in the latter part of 1954?

The Witness: That's right. So, in other 345 words, the industry started in 1954—there was an interest to purchase manganese ore and that already made the supplier's market more active until in December. Then, the Government announced the stockpiling program in chrome ore, manganese and other minerals.

Q. The United States Government? A. The United States Government; That, of course, [860] was the other much greater factor that all the supplies—that the market suppliers went wild. That was toward the end of December, in January and February, and so on.

Mr. Abrams: That is all.

Mr. Hyman: May I ask a question? Referring to the ore from the Swedish outfit which was made, you say, to the effect that the ore would be supplied at approximately
347 the same quality at $31.50 f. o. b. Bombay—that is correct?

The Witness: That is correct.

Mr. Hyman: What would that amount to if the quotation were based on c. i. f. discharged Mobile? Approximately.

The Witness: Well, suppose it was even for March shipment, that would amount to $45.

Mr. Hyman: $45?

The Witness: $44.75 or $45.

Mr. Hyman: Approximately?

The Witness: Around there.

* * * * * *

348 [863] Francis L. Rodney, called as a witness in behalf of the petitioner, having been first duly sworn by Albert Glotzer, a Notary Public, testified as follows:

Direct examination by Mr. Abrams.

Q. What is your name? A. Francis L. Rodney.

Q. Mr. Rodney, where do you live? A. 5610 Netherlands Avenue, Riverdale, New York.

Q. Now, in November and December, 1954, you were employed at Benjamin Schwartz & Company? A. Correct.

Q. In what capacity? A. I was a metal and ore trader for the company.

Q. You are now employed by Iida & Company, is that correct? A. Right.

Q. In what capacity? [864] A. As metal and ore trader.

Q. When did you join Iida & Company? A. Effective April 4, 1955.

Q. You are the gentleman who was instrumental in procuring the Hardy contract together with 350
Mr. Jablonka, for Iida & Company? A. Right.

Q. How long have you been in the metal and ore business? A. Since the end of the war, about August, 1945.

Q. You were dealing in manganese ore and other metals? A. Manganese, chrome, beryl, tungsten, and whatever ores there are, ores that are being brought to my attention and marketable.

Q. In your business experience, you have had occasion to examine frequently, contracts for the purchase of metal ores? A. Yes, sir.

Q. And letters of credit? A. Letters of credit, yes.

Q. Now, you brought together Mr. Jablonka 351
and Hardy & Company? A. I brought Iida and Hardy & Company together. I carried [865] on the negotiations, was acting intermediary at all times there. I carried on all the negotiations until the day at which the contract was agreed upon. I think it was December 1st, that week.

Q. And you had an arrangement with Iida & Company for your compensation as broker in this

852 *Francis L. Rodney—For Petitioner—Direct.*

connection? A. I had worked with Iida for about a year before that time, partly, sir, discussing business possibilities. We had a general understanding, whatever we did, we did for the best of both companies.

Finally, when we brought the manganese parcel into shape, and a firm bid to buy, and so on, we arranged for a profit division.

Q. Did you ever get the share of the profit on the Hardy and Iida transaction? A. No.

Mr. Hyman: No profit is claimed.

353 Mr. Abrams: I am just leading up to my question.

Q. Did you ever get any pay from Iida in connection with Hardy & Co.,? A. I, personally?

Q. I mean Benjamin Schwartz. When I say "you," I mean Benjamin Schwartz. What did Benjamin Schwartz get? [866] A. $1,000.

Q. For what did they receive $1,000? A. In consideration of their service in connection with what is called "buying in" of the Devidayal contract.

Q. The replacement? A. Replacement tonnage.

Q. What did you do on behalf of Benjamin Schwartz & Company in connection with trying
354 to replace the 8,000 tons?

Mr. Hyman: What did you do for that $1,000?

The Witness: For that $1,000, I worked hard, sir. I kept a memorandum system. I would like to refresh myself about it.

Mr. Hyman: I will be very happy if you do it.

The Witness: The contract was closed on December 2nd, on the 1st or 2nd. I maintained a liaison with Hardy & Co., mostly with Mr. Odell.

He answered certain questions put to us by Iida's Bombay office as to who was going to put the railroad car and barges alongside of the ship—which were answered, the American consignee would do that, meaning the Steel Company.

On January 12th, I received a call—wait a minute. Was it January 12th? Yes, on January [867] 12th, I received a call from Mr. 356
Odell in which he reported that he received a letter from one of his Indian correspondents and he quoted from this:

"I further got to know that you have recently bought a substantial quantity of 46/48 manganese ore from a very important Bombay producer, but I have confidentially come to understand that these supplies will not be effected by this firm for various reasons."

Q. Let me interrupt you at this point. Did you then receive a letter from Mr. Odell confirming that conversation? A. I am quoting from this letter. That was done over the telephone. Mr. 357
Odell confirmed it in writing.

Q. I show you this photostatic letter sent from Hardy & Co., sent by Odell. A. That is the letter I received, which I just quoted.

Mr. Abrams: I offer it in evidence as Petitioner's Exhibit No. 97.

Mr. Naidich: I would most likely label it as hearsay, but I won't object to it.

Mr. Hyman: Mark that Petitioner's Exhibit No. 97 in evidence.

[868] (The letter from Mr. Odell to Mr. Rodney, dated January 12, 1955, was marked Petitioner's Exhibit No. 97 in evidence) (not printed).

The Witness: Just to finish this part. I have a note here in the files. I immediately called Mr. Kato of Iida & Company and told him the gist of the telephone conversation with Hardy.

359 Q. Will you go on and tell us what you did in connection——

Mr. Hyman: In connection with your efforts to replace this cargo.

A. Okay, yes. I received advice from Mr. Kato, I think, that it wasn't so, and he expected to make delivery, and I advised Odell accordingly.

Mr. Hyman: You mean, you received advice from Mr. Kato that they were going to make delivery?

The Witness: Yes, I received advice from
360 Mr. Kato that they were going to make delivery.

Mr. Hyman: When did Mr. Kato advise you to that effect?

The Witness: The same day, on the 12th. That was the first intimation that I received that something was not quite the way it should be.

Q. Now, just tell us what efforts you made [869] immediately after this date to replace this 8,000 tons of ore? What did you do? A. On February 3rd, I started discussing with Iida the advisability to protect their own situation, whether they should not buy in. They asked me to sound out the market.

Beginning that day, I checked what the price situation was. That was mainly my service to Iida checking on the course of the market so that they should not go into this blindly.

Q. What did you find out and what did you report to them? A. I found out that late in 362
January—on February 3rd, I, together with Jablonka, started working on this and at that time we established that Golodetz could get control of a cargo then afloat which was analyzed at minimum 46 basis of 48 manganese, iron 8 to 9, silica and alumina combined, .15. This is the description the shipper gave.

Silica, the maximum—I beg your pardon. Maximum of 12 per cent, and phosphorus, .15.

This is the analysis the shipper invoiced and actually the Indian out-turn report was manganese 46.58; iron, 8; silica, 9.13; alumina, unreported, and phosphorus, .146.

[870] The question then occurred, what is 363
the alumina content? Then, it was unreported. It seems this was a case of a re-check. If the alumina is over 3 per cent, exceeding the total combination of 12 per cent of silica and alumina, the cargo would be subject to rejection, as not a perfect shipment, which seemed to be the case since it was afloat, and very rarely is cargo floating, unsold. Usually it is sold already.

We tried to establish the alumina content but never could do it. So, I asked Mr. Jablonka to see if we could buy it. So, the answer was:

"It could only be delivered to the East Coast and there was an objection to selling it to the U. S. Steel, which was a further complication."

Apparently, U. S. Steel had this cargo under contract and rejected it for bad analysis.

For this cargo, Golodetz indicated a price, since it was actually afloat, of $46 to $48.

Mr. Hyman: You mean, c. i. f. discharged
365 Mobile?

The Witness: That would be discharged at the East Coast only. We could not bring it to Mobile.

[871] A. (Continuing) That was one cargo I discussed with Odell, and discussed also with Mr. Odell to see whether I could possibly work out something with him, but we could not get together.

Q. What other efforts did you make? What other cargo did you try to get? A. I discussed the matter with Philipp Brothers some time during the week between February 3rd and the 8th.

Q. Whom did you see there? A. I spoke to Mr.
366 Forsheimer, Jr. Mr. Forsheimer, Jr., he is assistant to Mr. Rothschild, the head of the ore department, who was out of town at the time.

Now, Philipp Brothers, myself and Benjamin Schwartz had been friends of long-standing and have done considerable business with each other. Forsheimer told me:

"I want to help you and I will take it up at tomorrow morning's conference." Philipp Broth-

ers have morning conferences with all members discussing business over. He called me back the following day and said:

"I am sorry, Francis, I can't help you. We [872] are not open at all for this kind of manganese ore."

He told me at the time that during that week they had purchased a considerable tonnage of Moroccan manganese ore, a minimum of 48 manganese, which is better in impurities than Indian material. He said he got it at an equivalent of $45.50 or $46 c. i. f. discharged, East Coast. I subsequently established by import bulletins that 368
Philipp Brothers actually received such a cargo.

* * * * * *

IT IS STIPULATED that Mr. Henry Rothschild, the head of Philipp Bros.' ore department, referred to above, subsequently testified before the Arbitrator and made no reference to Mr. Rodney's foregoing testimony contained in his last two answers.

* * * * * *

[874] Q. What else did you do towards making an effort to replace this cargo? A. I contacted a friend of mine in Germany, Minas Rohstoff Gesellschaft of Essen, which is an ore trading company subsidiary to the Friedrich-Krupp. 369

They offered me on February 15, received in New York, a parcel of 1000 of a better grade material a minimum of 48 manganese, maximum 8 per cent. iron, maximum 10 per cent. silica and alumina combined, and maximum .15 phosphorus, at $37 f. o. b. Calcutta for March and April shipment.

Mr. Hyman: Did you get any quotations on manganese ore with phosphorus .18?

The Witness: I got all them. On this quotation, a contract would be an equivalent of $33.50. But this is my interpretation. This is my own idea of penalties and premiums on different types of ores.

I tried Metallurg, Inc. of 99 Park Avenue who, to my knowledge, operate mines in Turkey, who are both chrome and manganese producers. I asked them whether they could help me with at least a small shipment of
371 manganese of suitable quality to help Iida make a showing, to at least tender some of the merchandise.

[875] Mr. Hyman: What do you mean, suitable quality? .18?

The Witness: To fit in with the Iida contract with Hardy.

A. (Continued) But, I was told they were completely sold out. I mainly concentrated, as you can see, my efforts, and Mr. Jablonka's efforts, to secure replacement tonnage in New York.

Mr. Hyman. With domestic dealers?

The Witness: With New York firms, with
372 particular offices in New York, because we felt in that kind of situation, to develop any other source of supply in India, with the hazard of shipping, we wouldn't render a service to Iida which has their own office in Bombay.

However, I did run my own cross check with Indian firms to establish what the mar-

ket in India was, so I could give a full recommendation to Iida & Company.

At the time, I established the following: I had one offer, very little in January, January 27, for a 2000 ton parcel for April and May shipment which was both too high in iron, silica and alumina, at $31.50 f. o. b.

[876] Mr. Hyman: Where?

The Witness: Bombay.

A. (Continued) There was another offer which came across to me, across my desk, on January 21, which was for prompt shipment from Bombay, 374
$31.20, f. o. b. Bombay. It was a parcel of 2500 tons, 46-48 manganese, 9 per cent. iron, 9 per cent, silica, and 3 per cent. alumina, with .15 phosphorus. That was for the asking price of $31.20, which was equivalent to the Iida contract with Devidayal, again, according to my own merchant interpretation—would be equivalent to $31.70.

Mr. Hyman: You mean f. o. b.?

The Witness: F. o. b. for the better grade ore.

Mr. Hyman: The quotations you have been given are all f. o. b.?

The Witness: All f. o. b. Bombay.

375

Q. Did you make any inquiries and cross check with India? A. I made some inquiries in Goa.

Mr. Hyman: That is the place they asked the Portugese to give up in India.

A. But, I could not get the tonnage. Then, there is another facet which may be of interest. Late

in the second half of January, I received an offer from several [877] sources in New York, for a parcel.

These I have to draw on my memory. I don't have those notes. I don't have the complete Benjamin Schwartz file on hand. It was a parcel shipped by a first rate Indian shipper, other than Devidayal, about 2000 tons, which was rejected after analysis, sample analysis, and after it was aboard ship.

While afloat, the shipper tried to sell the cargo afloat. I tried to get hold of it and ultimately,
377 it was placed and an analysis given. This might be one of the parcels which the previous witness, whose testimony I listened to, bought in January. I rather think the shipper and his consignee came to terms and settled down on some sort of adjustment.

Q. By the previous witness, you mean Mr. Feuerring? A. Mr. Feuerring.

Mr. Hyman: You were in the room when he testified?

The Witness: I was in the room when he testified.

Mr. Naidich: Of course, this is pure speculation by the witness.

378 The Witness: I qualified it as such.

Mr. Hyman: All right, go ahead.

Q. Were there any other efforts made by you to [878] procure replacement cargo, either in India or elsewhere? A. This is a summary of the concreteness of my efforts. Of course, that means several days of work and an awful lot of walking around, jeopardizing and using connections,

such as Philipp Brothers, Metallurg, etc., to protect Iida's position, because, obviously, you want to protect a firm which gets into a tight spot such as this and not getting held up. That was my function in that.

Q. Mr. Rodney, when you found out that you could not get offers for February and March shipments—but were you able to get some for April and May shipment? Did you make any efforts with Hardy & Company to get an extension of the shipping date with them? A. You see, whenever I had one of these parcels before me, I picked up the telephone and discussed it with Mr. Odell. 380

Q. Of Hardy & Company? A. Of Hardy & Company. I tried to get these accepted and to work the thing out.

Q. Well, specifically, with reference to later shipping dates, April and May instead of February and March, did you discuss that with Mr. Odell? A. At all times, I pressed for an extension of [879] the shipment.

Q. And with what success? A. After it became clear that there was no part shipment in January, we discussed February cargo, or part shipment. Mr. Odell told me that—that if we provide a shipment of 4000, or even of 2500 tons in February, and place something concrete in his hand, he will 381 have a chance to talk about extension of the order with his buyers, the U. S. Steel Corporation.

Evidently, I have never been able to get a concrete offer on the part of Iida.

Mr. Hyman: Did you hear Mr. Odell testify?

The Witness: I was here when he testified.

Mr. Hyman: Did you hear him testify that he did get an extension from U. S. Steel on delivery of his product?

The Witness: Yes, I heard him testify that he got an extension.

Mr. Hyman: He refused to give you an extension.

The Witness: He refused to give me an extension, because I was not able to give him a concrete indication. By a concrete indication, he means whether space had been booked on steamer, or whether vessel had been char-
383 tered.

[880] It is a customary thing by the buyer, to ask from the seller if the seller has not—if he has reasonable doubt whether the contract will be filled. I have done it in different situations.

Q. Mr. Rodney, when you asked Mr. Odell to extend the time for shipment for Iida & Company, that was late in January? A. That was late in January when we discussed February and March.

Q. At that time, he refused to give you an extension? A. He refused to give me an extension beyond March.

Q. You heard Mr. Odell testify that after he
384 lined up the Associated Metals, which are dated—Associated Metals—which are dated March 21st and March 21st and March 22nd, he then was able to get an extension of time from his customer, U. S. Steel Corporation, is that right? A. Yes, sir.

Q. But, in January and early February, he wouldn't give you any extension? A. In January and February, he wouldn't give me an extension because apparently I didn't have one.

Mr. Hyman: Did you take part in the negotiation [881] for the settlement of the contract between Iida and Hardy & Co.?

The Witness: Yes.

Mr. Hyman: Did you have anything to do with the setting of the price at which the penalty or damages were set?

The Witness: Yes. I negotiated with Hardy on that beginning February 8. It took about a week to get matters together. February 8 I advised Odell that Iida wants to do the proper thing—as we call it in the trade—since their shipper failed to supply—seemed 386
to fail to supply them, they wished to make a clean breast of things, minimize the damage to themselves and to Hardy, if any, to keep their reputation.

That was put in operation. I noted the hour at 2:50 P. M. Mr. Tamaru authorized me to go ahead and start sounding out Hardy, how we could best proceed.

Mr. Hyman: Was the market then rising?

The Witness: Because the market was much higher and we knew Iida, we both realized that the penalty——

Mr. Hyman: The damages would increase the longer you waited.

[882] The Witness: The longer they waited. 387
It was the feeling that the damages would have to be paid. So I called Odell the afternoon of February 8th that we are ready to talk with him on a firm basis of "buying in", whether he could secure replacement tonnage, since previously he hinted to me—he didn't say it—he hinted to me making it possible for me to pick up the lead he gave me, he said:

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"Well, if you can't replace it, let us see what we have to do, what best can be done."

Mr. Hyman: When you say "buying in", you are talking of replacement?

The Witness: Replacement.

Mr. Abrams: He said that earlier.

Mr. Hyman: All right.

The Witness: That is the trade term for it.

A. (Continued) When we agreed to join our efforts to work it out to the lowest possible dam-
389 age—and he felt that was around forty-four to forty-five dollars—he might be able to work it out with Associated Metals at the time.

We had many telephone conversations during that week but never agreed upon anything definite because he was, I would say, jockeying with Associated Metals to put them in a frame of [883] mind that they would be willing in a rising market to fix a price now instead of waiting another week or two.

And also, I understood that Associated Metals told Odell, what he told me, that actually, at that time they had a commitment on the tonnage, they were going to hedge, which they did, to trade back from the mill.

390 For example, if a mill has a six-months stock pile—that is what you could get with many mills—some of them have a year and a half stock pile—well, Associated Metals has been supplying us. If they need 8,000 tons this month on the same situation, which is a problem to their company, as long as you replace their supply in May, it is all right, that is the purchasing agent would accommodate them.

Q. To bring this to a conclusion— A. How it is done is a different story.

Q. To bring this to a conclusion, was there a conference arranged? A. On February 15th we arranged for a conference. I arranged for a conference at M. W. Hardy's office with Mr. Fricke, Mr. Odell, Mr. Tamaru, Mr. Kato, and I participated in. Mr. Fricke went over the situation, explaining the Hardy point of view on their previous negotiations with Associated Metals. Mr. Tamaru then personally confirmed my previous undertaking that Iida would work it out with Hardy on an amiable basis. 392

[884] Mr. Hyman: Amicable basis.

The Witness: Amicable basis, thank you.

Mr. Hyman: Nothing amiable about this. Amicable.

A. (Continued) The next word was to come from Hardy & Company. We expected a day or so would pass by before Hardy would have an answer from Associated.

To my own surprise, the same afternoon at 4 P. M. we received a phone call from Mr. Odell that he has purchased—his customer, the steel mill, has called him and pressed him for quick action. Therefore, Mr. Odell's boss, Mr. Fricke, 393 went to Associated and got 4500 tons firm until 5 P. M. of said day—5 P. M. to us, or maybe 5:30, for $45.50.

Mr. Odell gave me forty-five minutes, until 4:45, to get Iida to give its consent to this purchase at $45.50.

I immediately called Mr. Kato and Mr. Kato told me that Mr. Tamaru, who was finally to have

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given an O.K. to such a transaction, was out of his office. I enjoined Mr. Kato to make every effort to reach Mr. Tamaru and to call back at 4:40, five minutes before the deadline expired. At that time Mr. Tamaru was still unavailable.

So at that time, 4:45, I called Mr. Odell and told him after this morning, with my best efforts—I can't see [885] your position—to have forty-five minutes to take up this matter with a man in New York who is not in his office, is not enough time. He agreed with me it wasn't enough time, but Mr. Fricke insisted he didn't want to stay open and
395 unless Iida assents he won't be able to give his customer an answer. On the other hand, he didn't want to lose the 4500 tons from Associated. So we talked about fifteen to twenty minutes, batting the problem to one another.

Then he put Mr. Fricke on the telephone and I again explained to Mr. Fricke forty-five minutes to get Mr. Tamaru who is not in his office is not enough time. I asked him, since I could understand his position, whether he wouldn't hold this firm offer overnight, 4500 tons for $45.50. Mr. Fricke felt since he had the firm offer only until the evening it would be taking a gamble.

I said, "Mr. Fricke, it is only twelve hours. It
396 is 5 o'clock right now. I don't think a sale will be made tomorrow morning, until tomorrow morning."

He said, "Francis, I am sure I have it firm until night. It is a tough market."

So I talked him into holding it open overnight when I had him in what I would say was a speculative frame of mind.

I told Mr. Fricke, "I understand Iida wants to [886] be free from the risk. They made a con-

tract in good faith. Now they are in a horrible situation. Now, they want to make a clean line under it. How about taking over the whole risk for $8, or 4500 tons at $9.50, at their option. Let them think about it during the night, because some time during the evening I will get to Mr. Tamaru."

I got the following answer from Mr. Fricke: "Francis, that is good trading. I will accept their good faith. I will take that chance."

It was agreed for their $4500.

Q. $4500? A. 4500 tons at $45.50, or the whole cargo at $44.50. 398

Q. You mean 8,000? A. 8,000 at $44.50, maximum damage would be based finally on the settlement with Hardy. I reached and reported this to Mr. Kato and Mr. Tamaru—I understand, by the 16th or 17th—I was out of town then. Based on this, they finally got the settlement agreement.

Mr. Abrams: Which is an exhibit——

Mr. Hyman: That is the agreement of February 17th. They set it down around $44.

Mr. Kassel: $44.50.

[887] Mr. Hyman: Was the market at the time of the settlement, when you finally got this figure, going down, beginning to soften, or was it tighter, stiffer? 399

The Witness: I would say it was a fair settlement, based on what I testified previously, my judgment of the market, which was based on the various offers I was able to obtain for material, not identical, but similar.

Mr. Hyman: Did the market go up after that?

The Witness: Subsequently, the market marked time for a few days and then again went up.

Mr. Hyman: Pardon me. Go ahead.

Q. What was the cause of this rising market, if you know? A. Some time in December the U. S. Government mentioned that they were now accepting manganese and ferro-manganese ores for payment on the supplementary stock pile barter arrangement. That immediately got the sellers excited, the sellers abroad and the miners, but, actually, no business was transacted.

401 About this December the mills, the consuming customers, the non-Government customers did not receive any impetus from this.

[888] I watched the market in connection with their business, their work at the time, and the first Government purchase which had any bearing on manganese ore was the ferro-manganese purchase for the supplementary stockpile made with Hoch Ofen Werke Phoenix, Dusseldorf or Duisberg. That transaction was actually signed in April. It was negotiated the beginning of February and actually signed in April.

Q. We don't care about that. A. I bring this in because the excitement started already in

402 December but the effects substantially of the excitement was delayed.

Q. You say this rise was due to the announcement of Government stockpiling. Was there any other apparent reason for the rise in the manganese market? A. The steel production in this country last year was low. While I don't have my notes with me, I watched that thing very carefully. I don't think it was maintained at 60

percent the length of time the other witnesses mentioned. I think the average production rate last year was closer to 80 percent than 60. 60 was the bottom.

Q. Was that rate of production increased at the end of the year? [889] A. The rate of production was increased at the end of the year.

Mr. Hyman: Off the record, please.

(Discussion off the record.)

The Witness: However, that causes always excitement at the source of the ore. It is not necessarily reflected by the steel mill operators in the price they are willing to pay. 404

As I said before, some of them have close to six months, some longer positions and sometimes a shortage of a special grade. But their over-all position is at least eight months to eighteen months on the average.

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[898] *Cross-examination by Mr. Naidich.*

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[915] Q. You also testified at length, at the other hearing, concerning your efforts to replace the ore? A. Yes, sir.

Q. What phosphorus content were you asking for? A. I tried to replace tonnage, and the phosphorus content was a subsequent question—what tonnage was available I tried to get phosphorus content up to .18, according to the terms of the Devidayal contract. 405

Q. And you weren't even able to get .18 phosphorus content ore? A. The .18 phosphorus content does not necessarily mean that there is a

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larger content of ore available, because ore, prior to shipment, is being mixed to bring the impurities of the manganese content within the contractual specifications.

Therefore, while there might be a large tonnage [916] of .18 phosphorus, it might be too low in manganese content and have to be mixed with another parcel to bring it up to manganese specifications, in which case the phosphorus content is lowered.

However, I tried, in my buying efforts, to secure tonnage, and I did not specify particularly what
407 the impurities were. I was trying to get as much tonnage as I could get, within the general specification, and put it up to Hardy whether they would accept them.

Q. In other words, all you were interested in was to get manganese ore, period? A. Within the general range of the specification contracted; and, as I think, I went specifically into the description of every parcel. Every parcel put before me was discussed with Hardy.

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[957] Ezra J. Gubbay, called as a witness by
408 the petitioner, having been first duly sworn by the notary public, testified as follows:

Direct examination by Mr. Abrams.

Q. Will you please state your full name and address? A. Ezra J. Gubbay, 122 East 42nd Street, New York 17, New York.

Q. In what business are you engaged, Mr. Gubbay? A. Well, we are engaged in the import and

export business, particularly minerals and ores.

[958] Q. And from what country do you do most of your importing? A. From India—minerals and ores of India.

Q. You were in business in India, too? A. Yes; still am in business in India.

Q. And you are also still in business in New York? A. Yes, sir.

Q. You were born in India, I take it? A. Yes, sir.

Q. Are you familiar with the manganese ore trade, particularly the India manganese ore trade? A. Yes, sir. 410

Q. Does your company have manganese mines in India? A. Yes, our associates in India have mines. We have several mines under production—advance money to, and so forth.

* * * * * *

[970] Q. Now, you were importing Indian manganese ore during the period approximately December 1954, or, are you familiar with the Indian manganese market? A. We had markets running at that time, with different sellers.

Q. And you are familiar with the market from that point on, right up to date, I presume? A. Yes, sir.

Q. Was there a rather sudden rise in the market after the early part of December, 1954? A. 411 Yes, there was a marked, pronounced rise then, due to increased demand—consumption—increased demand from the consumer.

Q. And principally consumers in this country? A. Principally in this country. I believe Europe was also active, and possibly our friends in Japan might also have been boosting up the Indian market.

I would not be absolutely sure on the Japanese or the European situation, but as far as the American situation is concerned, definitely there was tremendous [971] pressure to buy ore; and the ore was available in India at that time due to the fact that there was a terrific slump in the manganese industry; and there were thousands of tons stockpiled in the central provinces. And 20,000 or 30,000 miners——

* * * * * * *

[973] Q. You ascribed the increase in the market price to the increased demand. That would
413 be increased demand by whom in America?

Mr. Hyman: He said from the industry.

Q. Is it the steel industry? A. The steel industry.

Q. Manganese ore is used in the manufacture of steel, is it not? A. Yes.

* * * * * * *

[984] Q. I want to discuss with you now the state of the market price of manganese ore of these sp ifications, on a c. i. f. basis, in February, 1955 for spot delivery, February and March delivery.

414 Do you know what the prevailing market price was, or the general market price? A. In February, for shipment in February?

Q. In February and March, 8,000 tons. I have to figure on a lot of 8,000 tons to be shipped in February and March. A. By that time the market had run away with itself. Let's put it that way. And what existing [985] tonnage of high-grade ore they had available in the various mining

centers of India were already, to the best of my knowledge, bought and contracted for by local importers in the United States and local exporters in India.

Therefore, to be able to get, at a moment's notice—and I do call thirty to forty days a moment's notice in a rising market—8,000 tons of this particular grade—I am sorry—this particular desirable grade—would be quite difficult; and if it had to be done, quite a substantial premium would have to be paid for it.

Q. Do you know what the prevailing market price in February was for Indian ore of these 416
specifications for delivery in March and April? A. That is a question that can be answered by trying to always analyze the mentality of the seller. You might think this is not governing at this particular point. But if you will bear with me I will explain to you why.

If the seller is looking for a long term—sort of creating good will, he will let the ore go at a reasonable rate. But since those types of sellers are few and far between, not only in India but all over the world, I would say one would have to pay [986] rather high prices. I would not do it.

Q. You mean you would not be held up? A. 417
I would not have offered this ore at an abnormally high price.

Q. Mr. Gubbay, Iida & Company had to agree to pay $44.50.

Mr. Hyman: Or he agreed to pay.

Q. He agreed to pay $44.50 a ton c. i. f. for ores of substantially this type, except the phos-

phorus content was 0.15; and, as to one shipment, the phosphorus content was 0.10.

Q. Would you, from your knowledge of the market prevailing at that time—this was for April-May delivery—would you say that $44.50 per ton was the general market price at that time?

Mr. Hyman: Was the fair and reasonable market price.

Give him the dates the contract was made and it related to future deliveries. It was not a spot transaction. You are referring to the consummation of an agreement on or
419 about February 17th for delivery in April and May.

Mr. Abrams: Yes, but the contracts actually were made between Hardy and Associated Metals on March [987] 22nd and March 24th, I believe.

Mr. Hyman: Why don't you separate your question into simpler questions and separate each one?

You can refer to the various dates. You can refer to the date of the settlement effected on February 17th and you can refer to the subsequent transactions in March.

It would be impossible for the witness to
420 give an answer that would fit each situation where you put such a complicated question.

Q. I show you, Mr. Gubbay, Petitioner's Exhibit 31, which is a letter agreement entered into between Iida and M. W. Hardy & Company, and I ask you to please be good enough to read that, and then I will question you about it. A. (Witness read the paper.)

May I ask a question?

Q. Yes. A. What is the freight they paid on it?

Q. That is without reference to freight. That is $44.50 c. i. f.

Under the contract between Hardy and Iida, shipments were to be made January, February and March. January had already passed. So shipments would have to be made [988] under this letter agreement in February and March. A. I would say——

Q. Let me ask you: Would you say that the price of $44.50 was a fair and reasonable price at that time for February and March shipments? A. In view of the situation, I can't consider it excessive. 422

Mr. Hyman: Would you consider it fair and reasonable under the circumstances and in the market, or don't you know?

The Witness: I do know, sir. Again it is something, if somebody wants a thing badly, you have to pay for it.

Mr. Hyman: The point is, what was the fair and reasonable market value of this type and quality of manganese ore for shipments at the times indicated at the time this agreement was made?

The Witness: But I don't think that at this time—I don't think—first of all, you are contracting in the period of February to get delivery within a pretty close time. 423

Mr. Hyman: It is practically a spot transaction?

The Witness: Yes. And I think that definitely [989] demands a premium: and that that is definitely——

Mr. Hyman: Fair and reasonable at that time?

The Witness: Yes; more than fair and reasonable at that time, definitely.

* * * * * * *

[1010] HENRY ROTHSCHILD, called as a witness by the respondent, having been first duly sworn by the notary public, testified as follows:

Direct examination by Mr. Naidich.

425

Q. Please give your full name and address. A. Henry Rothchild, 70 Pine Street, New York 5, New York.

Mr. Hyman: What is the home address, Mr. Rothschild?

The Witness: 211-07 42nd Avenue, Bayside, Long Island.

Q. By whom are you employed, Mr. Rothschild? A. Philipp Bros.

Q. What is your position with Philipp Bros.? A. I am connected with the ore department.

Q. What does Philipp Bros. do? A. One of 426 the largest importers of minerals and non-ferrous ores, including manganese.

Q. How long have you been engaged in the ore [1011] business? A. I have been engaged in the ore business since 1936, and since 1946 with Philipp Bros.

Q. In connection with your position with Philipp Bros. do you have occasion to buy and sell man-

ganese ore from India? A. I am in charge of our organizations in India and I have started our offices in India a few years ago; and we have since then bought under my supervision large quantities each and every year from India, as a matter of fact.

Q. Are you familiar with the market prices prevailing for Indian manganese ore during the period December 1954, January, February and March 1955? A. Yes, sir.

Q. I show you Exhibit 13, contract dated December 8, 1954, and just direct your attention specifically to the specifications set forth for the 428
ore. Based on your experience and dealings in the Indian manganese ore market, would you please tell me at what price, if any, manganese ore of that specification was being offered in India? A. When?

Q. In January, 1955.

[1012] Mr. Abrams: For shipment when?

Mr. Naidich: For shipment January, February and March, 1955, to United States ports.

Mr. Hyman: I think the witness wants to know to what market you are referring, whether to January shipments, which would be a future, or are you referring to January 429
market for spot delivery?

Q. (Continuing) January market for delivery made January, February and March. A. In other words, one-third spot, one-third February and one-third March?

Q. That is right. A. I believe we had quite a few offers of manganese ore complying with

these specifications during January at prices around $27 f. o. b. India.

Those were offers directly from producers in India.

We at that time were not too interested to purchase, but it is my feeling that if I would have been interested I could have gotten a few thousand tons of this ore in January for January, February and March shipment at between $26 and $27.

Q. Could you have gotten the amount specified [1013] in that contract for delivery during the
431 period named in that contract, namely, 8,000 tons, for delivery in January, February and March, in partial shipments or in one shipment? A. In January some of the producers in India were anticipating firmer markets and were a little bit careful.

I believe I should have had no difficulty to get a minimum of 5,000 tons—5,000 to 8,000 tons in January at this price and the balance some time in February at a slightly higher price, that is, at $1 or $1.25 higher.

Q. Was there any indication in the month of January that the market was tightening up on this ore? A. Yes, in India very definitely, due to inquiries from Europe and in this country.

432 Q. So a person desiring to fulfill this contract should have acted through January? A. Immediately—acted without delay. A person should have been panicky.

Mr. Hyman: A person should have acted panicky? Market was tightening up?

The Witness: Yes. The Europeans were buying in January and February fairly large quantities [1014] in India.

Mr. Hyman: When you say "panicky"——

The Witness: They should not have waited too long.

Mr. Hyman: They were confronted by a situation where prices were going up very rapidly rather than gradually?

The Witness: Yes.

* * * * * *

Petitioner's Exhibit 4.

RCA RADIOGRAM

FROM IIDA, BOMBAY, TO IIDA, NEW YORK 434

STANDARD TIME
1954 DEC -1 PM 12:06

CABLED HARDYACE (CODE NAME FOR HARDY & CO.) QUOTE YTEL (CODE FOR "YOUR TELEGRAM") 29TH 30TH ACCEPT SUBJECT REPLY HERE NOON TOMORROW YOUR TERMS PROVIDED SILICA REJECTION 8.5 BUT OUTTURN 9-0/0 WITH PENALTY 25CENTS LTU ABOVE 8 0/0 SHIPMENT JAN/MAR EACH MINIMUM 2500 LTONS OR ONE LOT FEBRUARY SHIPPERS OPTION FREIGHT TO COLLECT B/L ACCEPTABLE IN CASE LINER VESSELS BUT FREIGHT TO BE PAID COMPLETION LOADING IF CHARTER VESSEL STOP CREDIT BEFORE 20TH DECEMBER SURVEYOR DESTINATION BOOTH STOP TERMS VERY FAVOURABLE REQUEST ACCEPT UNQUOTE

435

PRICE WITH DEVIDAYAL $35.00. BECAUSE OF CURRENT STRONG FREIGHT MARKET DEVIDAYAL CANNOT PROMISE SHIPMENT FEBRUARY IN ONE LOT BUT SAYS THEY WILL TRY THEIR BEST TO COMPLY OUR DESIRE. DEVIDAYAL INSIST EARLY OPENING OF L/C ENABLING THEM TO WORK OUT DRAFT LOAN FOR ANOTHER EXPORT CARGO ARRANGEMENT ABOVE ARE VERY REASONABLE TERMS. IN VIEW OF MARKET SITUA-

TION WHICH IS CONSTANTLY GROWING STRONGER IF WE MISS THIS CHANCE I HAVE NO CONFIDENCE I CAN OBTAIN ANOTHER DEAL MORE ADVANTAGEOUS THAN THIS IN FUTURE AM RELYING ON YOUR BEST EFFORT PRESUME 6000 TONS MENTIONED IN YOUR CABLE 30TH MISTAKE FOR 8000 TONS.

Petitioner's Exhibit 5.

MACKAY RADIOGRAM

FROM IIDA, NEW YORK TO IIDA, BOMBAY

437 DEC. 1, 1954

WE ACCEPT YOUR CABLE OF 1ST. ONLY L/C TERM NOT ACCEPTED BY HARDY SO NEW YORK OFFICE (IIDA N.Y.INC.) WILL OPEN L/C IN FAVOR OF DEVIDAYAL BY 20TH. HARDY WILL OPEN LOCAL L/C IN FAVOR OF NEW YORK OFFICE 30 DAYS PRIOR TO LOADING OF SHIPMENT.

Petitioner's Exhibit 13.

DEVIDAYAL (SALES) LTD.,
GUPTA MILLS ESTATE, REAY ROAD,
DARUKHANA, BOMBAY 10.

438 8th December '54.

CONTRACT MN/200

1. SELLERS:

M/s. Devidayal (Sales) Ltd.,

Gupta Mills Estate,

Reay Road, Darukhana,

Bombay 10, India.

2. BUYERS:

Messrs. Iida & Co. (New York) Inc.,
New York.

3. COMMODITY:

Indian Manganese Ore.

4. QUANTITY:

8,000 (eight thousand) Long Tons, 10% more or less at Sellers option.

5. SPECIFICATIONS: 440

Manganese Ore of Indian origin, of metallurgical quality not more than 5% maximum fines passing through 20 mesh Tyler standard screen guaranteed to analyse at 105° C as follows:

Minimum	46%	Mn
Maximum	8%	Fe
Maximum	8.50%	Silica
Maximum	3%	Alumina
Maximum	0.18%	Phosphorous.

The Buyers shall have the right to reject the material if on assay the analysis does not 441
conform to the specifications mentioned above only at the port of shipment.

6. SHIPMENT:

During January/March 1955 in minimum monthly quantities of 2,500 tons or alternatively as one shipload, at Seller's option, in liner or charter vessel at Sellers' option.

7. PRICE:

U. S. $35.25 per dry long ton, C.I.F. Mobile with freight basis at $11.50 maximum, liner vessel, increase if any to Buyers' account, Basis 48% Mn with scale of 50 cents per unit per ton of Mn up and down 48%, fractions in proportion.

8. SPECIAL CONDITIONS:

At the destination port, Silica will be acceptable up to maximum 9% with a penalty of 25 cents per unit of silica per ton, fractions in
443 proportion above 8%.

9. PAYMENT:

Confirmed irrevocable Letter of Credit to be opened in favour of Sellers by the Buyers, for 110% C.I.F. value of the goods, definitely before the 20th December 1954, with validity until the determination of the outturn sampling, weighment and analysis of the goods and final settlement of account, permitting negotiation as follows:

(a) 100% payment against the following documents:

444 i. Seller's sight draft in duplicate

ii. Sellers invoice in triplicate

iii. Full set ocean clean on board Bills of Lading—Charter Bills of Lading also will be acceptable.

iv. Port Trust Weight Certificate duly certified by the samplers.

v. Sampling and Analysis Certificate.

vi. The Sellers' guarantee bond in favour of the Buyers for 10% value of the Credit to be executed through bank valid till the determination of outturn analysis weight and sampling reports to provide for any required adjustments in the value on the basis of the outturn reports.

(b) Regarding freight payment, "Freight to collect", Bills of Lading to be obtained for negotiation by the Sellers in case of liner steamers or alternatively the Buyers shall pay the freight in New York immediately upon completion of loading if Charter vessel, in U. S. Dollars. 446

10. SAMPLING, ANALYSING & WEIGHMENT:

(a) At the port of shipment the sampling and analysing operations will be carried out by M/s. Hughes & Davies of Bombay and against their reports the Sellers can negotiate the L/C for full 100% value.

(b) At the port of shipment, the weighment will be conducted by the Bombay Port Trust Railways, whose weight report will be final for negotiating the Credit for 100% value. 447

(c) At the port of destination, the sampling & analysing Certificates by M/s. Booth Garrett & Blair will be acceptable and weighment by U. S. Rail Road will be acceptable if duly confirmed by the samplers.

(d) The cost of sampling, analysing and weighment operations at the port of shipment is to the Sellers' account and that at the port of destination will be to the Buyers' account.

(e) The Sellers have the option to have the outturn operations duly supervised by their representatives.

11. INSURANCE:

Insurance to be covered by the Sellers up to 110% of the invoice value. Claims payable in Dollars in New York.

12. FORCE MAJEURE:

The delivery by the Sellers is subject to usual force majeure causes, such as acts of God or of the public enemy, fires, floods, epidemics, Government orders, bans, etc., and if shipment is delayed on account of these reasons beyond the control of the Sellers, the Buyers agree to extend the Letter of Credit and delivery period accordingly.

13. ARBITRATION:

All disputes arising out of this contract will be settled by Arbitration, in New York.

ACCEPTED:
BUYERS:

IIDA & CO., LTD.,
Representative.

DATED: BOMBAY, 8th December 1954.

ACCEPTED:
SELLERS:

for DEVIDAYAL (SALES) LTD.,
Managing Director

DATED: BOMBAY, 8th December 1954.

451

Petitioner's Exhibit 21.

(Letterhead of Devidayal (Sales) Ltd.)

6th January 1955.

Messrs. Iida & Co. ltd.,
Bombay.

Dear Sirs,

Re: Contract MN/200.

Referring to our letter of the 3rd instant on the 452
subject of the above Contract, we have now to inform you that we have received the confirmation advice of your Credit through the Bank of Tokyo Ltd., Bombay. On going through the terms and conditions of the Credit, we find that there are many stipulations in your L/C which are not in accordance with the terms and conditions of our Contract with you.

We have therefore written to the Bank of Tokyo Ltd., Bombay, as per copy of our letter enclosed herewith that your Credit is not acceptable to us. According to Clause No. 9 entitled "PAYMENT" of our Contract with you, it was incumbent on you to open Credit in our favour as per terms and 453
conditions of the contract, definitely before the 20th December 1954 and since you have failed to open your Credit conforming to the terms and conditions of the contract by the 20th December

454 *Petitioner's Exhibit 21.*

1954, we hereby treat the contract as formally cancelled. Please take note accordingly.

Yours faithfully,

for Devidayal (Sales) Limited.

Encl: 1

cc to: M/s. Iida & Co. Ltd., Tokyo.

cc to: M/s. Iida & Co. (New York) Inc.
New York.

455 **Petitioner's Exhibit 22.**

(Letterhead of Devidayal (Sales) Ltd.)

6th January, 1955.

The Sub-Manager,
Bank of Tokyo, Ltd.,
Bombay.

Re: Your New York Office L/C No. 3633 for US$209.000 For account of M/s. Iida & Co. (New York) Inc. 25 Broad St., New York N. Y.

456 We acknowledge receipt of your letter of the 4th instant submitted to us in duplicate, along with the confirmation advice of your New York office Credit No. 3633 for $209,000. On going through the terms and conditions of the Credit, we find that they are not in accordance with the terms and conditions of the Contract we have entered into with M/s. Iida & Co. (New York) Inc., New York. In the circumstances, your Credit is not acceptable to us and therefore we cannot re-

Plaintiff's Exhibit 22. 457

turn the duplicate copy of your letter of the 4th instant, confirmed by us.

With regard to the discrepancies in the Credit, we are taking up the matter with the Bombay representatives of M/s. Iida & Co. (New York) Inc. directly, which please note.

Yours faithfully,

For Devidayal (Sales) Ltd.,
Sd.
Mg. Director.

w/ksg.

458

cc to: M/s. Iida & Co., Ltd.,
Botawala Bldg.,
Elphinstone Circle,
Bombay-1.

cc to: M/s. Iida & Co., Ltd.,
Tokyo.

cc to: M/s. Iida & Co. (New York) Inc.
25 Broad St. New York, N. Y.

459

460

Petitioner's Exhibit 27.

(Letterhead of Iida & Co., Ltd.)

Bombay, 8th January '55

M/s. Devidayal (Sales) Ltd.,
Darukhana, Mazagaon,
Bombay-10.

Dear Sirs,

Re: Contract No. MX-200

With reference to your letter No. 33 dated the
461 6th instant, we have to state that every contention apart from being vague and indefinite is incorrect and that you have no right to treat the contract as formally cancelled or to cancel it and we have further to add that unless you withdraw the said letter within twenty four hours of receipt of this, we shall take it that you do not want to do your part under the contract and that you have committed breach thereof on account of the rising market, and we will have no option but to put the matter in court and you will be held liable for all consequences and costs thereof.

Yours faithfully,

462

IIDA & Co., LTD.
H. MUNAKATA
Representative

c.c. to our New York Office.
Metal Department, Tokyo Office.
Gyombu, Tokyo Office.

463

Petitioner's Exhibit 28.

(Letterhead of Devidayal (Sales) Ltd.)

Registered A/D.

January 10, 1955.

Messrs. Iida & Co. Ltd.,
3rd floor, Botawala Building,
Elphinstone Circle,
Bombay.

Re: Contract No. MN-200.

464

Dear Sirs,

We are in receipt of your registered letter of the 8th instant on the above subject and in reply, we have to repeat that for reasons already explained in our various letters, our above contract with you already remains cancelled.

Please, therefore, note that you have committed the breach of contract and therefore, all the consequences and costs resulting thereof are entirely your responsibility. We are at any time prepared to prove what we have done is correct and justified in any Court of Law should necessity arise.

Yours faithfully, 465

for Devidayal (Sales) Ltd.

sd- Mg. Director.

Advance Copy by hand.

466

Petitioner's Exhibit 29.

(Letterhead of Iida & Co., Ltd.)

Bombay 13th January 1955

Registered A.D.

M/s. Devidayal (Sales) Ltd.,
Darukhana, Mazagaon,
Bombay-10.

Dear Sirs,

Re: Contract No. MN-200—8,000 tons
467 48/46 Manganese Ore.

We are in receipt of your letter of 10th instant, wherein you have stated that the above contract remains cancelled for reasons already mentioned in your various letters.

You have so far raised two issues, one being that the Credit has not been opened in time and the second being that the said Credit is not in accordance with the terms and conditions of the contract as far as payment clause is concerned. The Contract calls for, for the establishment of the Letter or Credit on or before 20th December 1954. Against this, we have established the credit
468 on the 16th December itself and this fact was intimated to you by telegram on the 17th December, duly confirmed under your letter of 18th December 1954. It is not mentioned in the contract that you should receive the Credit on the date mentioned therein and as such it is quite improper for you to say that the Credit has not been opened in time.

Petitioner's Exhibit 29. 469

The contract calls for, for the establishment of a Guarantee Bond to the extent of 10% by you in our favour and according to this, it will not be possible for you to negotiate any documents unless the said Guarantee Bond is established. Under our Credit No. 3633 of the Bank of Tokyo Ltd., it is mentioned that the Credit would become effective upon the establishment of the Guarantee Bond, duly confirmed by this office. We do not think that there is any change in the sense. It is immaterial whether we institute or incorporate the particular clause in the contract or the clause already mentioned therein and as such we feel 470 that the arguements put forward by you are quite out of place and irrelevant.

Our relations for the last two years have been very pleasant and it is really unfortunate that you have now adopted this attitude and we are confident that better counsel will prevail and you would make the necessary arrangements to effect the shipment in time.

Thanking you,

Yours faithfully,

H. MUNAKATA
Representative 471

c.c. to our New York Office.

our Tokyo Office, Metal Department.
Gyomubu, Tokyo Office.

Advance copy by hand delivery.

472

Petitioner's Exhibit 30.

(Letterhead of M. W. Hardy & Co., Inc.)

December 2, 1954.

CONTRACT NUMBER 1137

Messrs. Iida & Co. Ltd.
Botawala Building,
Elphinstone Circle,
Bombay, India.

PARTIES:

473 M. W. HARDY & Co. INC. (hereinafter referred to as Buyer) agrees to purchase and IIDA & Co. LTD. of Bombay, India, (hereinafter referred to as Seller) agrees to sell manganese ore in the amount and in accordance with the terms and conditions hereinafter set forth.

QUANTITY:

Approximately eight thousand (8,000) gross tons (2,240 lbs. each) 5% more or less, Seller's option, of Manganese Ore originating in India.

CHEMICAL SPECIFICATIONS:

474 The ore shall conform to the following dry analysis:

Manganese	Basis 48%	Minimum 46%
Iron	8% Maximum	
Silica	8.5% Maximum	
Alumina	3% Maximum	
Phosphorous	0.15% Maximum	

Petitioner's Exhibit 30. 475

PHYSICAL SPECIFICATIONS:

Hard, lumpy ore with 75% not smaller than one inch and a maximum of 5% fine material which is passable through a number 20 mesh Tyler screen.

REJECTION:

If the ore does not meet above specified maximum and minimum chemical or physical specifications, Buyer shall have the option of rejecting the ore at the port of loading.

TAXES: 476

All taxes, duties, levies, impost, tariffs, licenses and fees of whatever nature, now or hereafter imposed which become applicable before shipments are loaded on board carrying vessel, shall be for Seller's account.

PRICE:

U.S. Dollars Thirty Six ($36.00) per dry gross ton basis 48% manganese c.i.f. Mobile, Alabama, discharge included. For each 1% of dry manganese above 48% dry manganese there shall be a premium of 50¢. For each 1% of dry manganese below 48% dry manganese, down to and including 46% dry manganese there shall be a penalty of 50¢, all fractions prorata. 477

SHIPMENT:

From Bombay, India, one shipment of the entire quantity in February 1955. Alternatively, 2500 gross tons minimum each January/February 1955 and balance, if any, March 1955, Seller's option.

478 *Petitioner's Exhibit 30.*

PAYMENT:

Buyer shall open Letter of Credit, or Letters of Credit 30 days in advance of loading date or loading dates, in favor of Seller through a bank designated by the Seller, for the full f.o.b. vessel value of each shipment. The Letter of Credit or Letters of Credit are payable alternatively A or B, indicated below, against the following documents:

ALTERNATIVE A—BERTH TERMS:

479 1. Supplier's commercial invoice in triplicate covering 90% of the f.o.b. vessel value of the ore.

2. Certificates of moisture, sampling, physical specification and chemical analysis, obtained at Seller's expense, to be prepared by either R.V. Briggs or Hughes & Davis of India, certifying that the ore shipped is in conformance with the maximum or minimum specifications outlined under Chemical Specifications and Physical Specifications of this order.

3. Weight certificate by Bombay port of authority at Seller's expense.

480 4. A certificate confirming that the Indian export duty has been paid or that the ore is free of Indian export duty.

5. Full set of clean, on board ocean Bills of Lading marked "Freight Collect".

ALTERNATIVE B—CHARTER TERMS:

The same as above with the exception of Point 5, in which case the ocean Bills of Lading must

be marked "Freight Prepaid". For this purpose, Buyers, upon receipt of advice from Sellers, will increase the Letter of Credit to cover the cost of the freight and allow for prepaid Bills of Lading.

FREIGHT CHARGES:

It is understood that the freight charges in Alternative A and B, indicated above, are to be deducted from the selling price of $36.00 per gross ton c.i.f. Mobile, Alabama, discharge included.

INSURANCE:

Buyers will cover the insurance for 110% of 482
the value of the material here in the U.S.A. and Sellers agree to deduct the appropriate amount for the insurance from the selling price of $36.00 per dry gross ton c.i.f. Mobile, Alabama.

FINAL PAYMENT:

Final adjusted payment will be made by Buyer immediately after arrival of the material in the U.S.A. upon presentation of Seller's invoice based on weights and analysis as provided for in this contract.

FINAL SAMPLING, MOISTURE & ANALYSIS:

483
The ore shall be sampled during vessel discharge by Booth, Garrett & Blair of Philadelphia, whose analytic determination of moisture and elements in the dry shall be final and binding upon both Buyer and Seller. The expenses for such sampling and analyzing shall be for the Buyer's account.

484 *Petitioner's Exhibit 30.*

FINAL SETTLEMENT OF WEIGHTS:

U.S. Railroad track scale outturn weights at port of discharge adjusted to a dry basis in accordance with Booth, Garrett & Blair analysis shall be the basis for the final settlement.

DISCHARGE DEMURRAGE & DESPATCH:

Cost of vessel discharge into cars, demurrage or despatch incurred at port of discharge to be for account of Seller.

FORCE MAJEURE:

485 Neither Seller nor Buyer shall be liable for failure to make or receive any delivery hereunder caused by or resulting from strikes, fires, floods, wars, riots loss or destruction of the material, non availability of transportation facilities, delays of carriers, embargoes, accidents, restrictions imposed by any government or governmental authority, or without limitation any other cause beyond the controls of the Seller or Buyer, as the case may be, whether similar or dissimilar to the causes enumerated. The time of the Seller to make any delivery hereunder shall be extended during any period in which such delivery shall be prevented by reason of any of the foregoing
486 causes, provided that if any delivery hereunder be so prevented for more than three months, either party shall have the right to cancel this agreement with respect to such delivery by written notice to the other.

Petitioner's Exhibit 30. 487

ARBITRATION:

All disputes arising out of the present contract shall be conducted at the competent Arbitration Court in the U.S.A.

REMARKS:

If the chemical outturn analysis on the silica content at the port of discharge should be higher than 8.5%, but not exceeding 9%, the penalty for the excess will be 25¢ per long ton unit, fractions prorata.

M. W. HARDY & CO. INC. 488
J. R. ODELL
JOSEPH R. ODELL

ACCEPTED: IIDA & CO. LTD.

H. MUNAKATA
Bombay Representative

489

490

Petitioner's Exhibit 31.

(Letterhead of Iida & Co. New York, Inc.)

February 17, 1955

M. W. Hardy & Co., Inc.
141 Broadway
New York 6, New York

Gentlemen:

Re: Contract No. 1137 dated December 2, 1954 at New York, Between Iida & Co., Ltd. and M. W. Hardy & Co., Inc. for
491 8,000 L/T of Indian Manganese Ore. (5% more or less at sellers option)

As we advised your Mr. Fricke and Mr. Odell, we are unable to make delivery of the Indian Manganese Ore under the above numbered contract for the reason that our supplier has defaulted on its obligation to deliver to us. We have attempted to replace this ore in the open market, but have not been successful in doing so.

We understand from you that you are attempting to purchase 7600 L/T of this ore at a price not exceeding $44.50 per long ton, which is $8.50 higher per long ton than the price which you
492 agreed to pay us.

We hereby agree to have you replace the 7600 L/T of Indian Manganese Ore which we contracted to deliver to you by your purchasing the same in the open market at a price not in excess of $44.50 per long ton and to pay you the difference of $8.50 per long ton to make up the difference between the price at which we agreed to

deliver and the price which you are obliged to pay, it being our intention that you will purchase this ore for our account in order to complete our contract with you.

We agree that the difference of $8.50 per long ton shall be paid by us as follows: $30,000 by our check on your signing this letter and the balance of $34,600, by our executing and delivering on or before February 23, 1955, to you a promissory note or other evidence of indebtedness, guaranteed by a New York banking institution.

In the event that the price that you are obliged 494
to pay for the 7600 long tons hereinbefore referred to should be less than $44.50 per long ton, it is understood that you are to refund to us any difference between the $44.50 and the price actually paid by you.

In making the aforesaid arrangement with you, we are relying upon your representation that you are attempting to purchase the 7600 tons of manganese at $44.50 per long ton and that you will agree that, upon receiving the payments aforementioned, Iida & Co., Ltd., as well as Iida & Co. New York, Inc., are to be released from any further liability to you arising out of the contract entered into between Iida & Co., Ltd., and yourselves, dated December 2, 1954 and bearing number 1137 or in connection with this transaction 495
with you.

If the foregoing meets with your approval, you will kindly have one of the authorized officers of your company sign the acceptance of this arrange-

496 *Petitioner's Exhibit 31.*

ment by affixing his signature to the copy of this letter.

Very truly yours,

IIDA & CO. NEW YORK, INC.

By TEIJI TAMARU, President

We hereby agree to the terms and conditions set forth above.

Dated, New York, N. Y. February 17, 1955.

497

M. W. HARDY & CO., INC.
By: P W FRICKE
President

Petitioner's Exhibit 32.

Check for $30,000.00, from Iida & Co. New York, Inc. to M. W. Hardy & Co., Inc., dated February 17, 1955.

498

(Bound in Opposite.)

38

BY ENDORSEMENT THIS CHECK IS ACCEPTED
IN FULL PAYMENT OF THE FOLLOWING ACCOUNT

DATE	AMOUNT
Pursuant to letter agreement dated Feb. 17, 1956.	

TOTAL OF INVOICES
LESS % DISCOUNT
LESS
TOTAL DEDUCTIONS
AMOUNT OF CHECK

IF INCORRECT PLEASE RETURN NO RECEIPT NECESSARY

IIDA & CO. NEW YORK, INC.
25 BROADSTREET, NEW YORK 4, N. Y.

No. 1713

1-8
210

PAY TO THE ORDER OF

NEW YORK February 17 19 56

M. W. Hardy & Co., Inc. $ 30,000.00

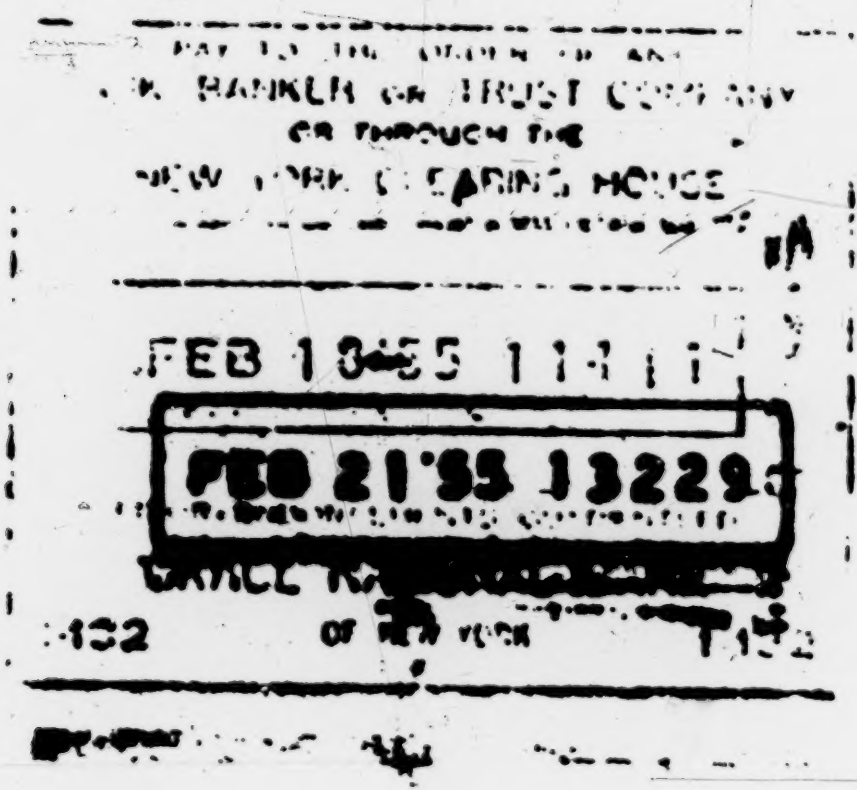
Thirty thousand exactly DOLLARS

IIDA & CO. NEW YORK, INC.

Authorized Signature

TO
THE NATIONAL CITY BANK OF NEW YORK
TWENTY-SIX BROADWAY BRANCH
TWENTY-SIX BROADWAY AT BEAVER STREET
NEW YORK, N. Y.

(Front)


FEB 1955 11-11
FEB 21'55 13229
132

Petitioner's Exhibit 32

(Back)

PAY TO THE ORDER OF
GRACE NATIONAL BANK
FOR DEPOSIT
M. W. HARDY & CO., INC.

22.15

502

Petitioner's Exhibit 33.

THE BANK OF TOKYO, LTD.
NEW YORK AGENCY
100 BROADWAY
NEW YORK 5, N. Y.

Irrevocable Export
Credit No. 3986

Dated February 23, 1955
This confirms our telephone
conversation with Mr. Fricke

503 M. W. Hardy & Co., Inc.
141 Broadway
New York 6, N. Y.

Gentlemen:

At the request of Iida & Co. New York, Inc., 25 Broad St., New York, N. Y.

We hereby establish our Irrevocable Credit in your favor for account of Iida & Co. New York, Inc. for a sum or sums not exceeding a total of $34,600.00 (Thirty Four Thousand Six Hundred Dollars) available by your drafts on us at sight for full receipt value accompanied by the following documents:

504

Beneficiary's Receipt for the payment stating that the drawing is in strict accordance with the agreement dated February 17, 1955 between M. W. Hardy & Co., Inc., and Iida & Co. New York, Inc., at New York, N. Y.

Of the credit amount, 50% ($17,300.00) is payable on September 30, 1955 and balance of 50% ($17,300.00) is payable on December 31, 1955.

Petitioner's Exhibit 33.

505

We engage with you that all drafts drawn under and in compliance with the terms of this credit will be honored on delivery of documents as specified if presented at this office on or before December 31, 1955.

Very truly yours,

For The Bank of Tokyo, Ltd.
(Illegible)
Pro-Agent

Accepted by

M. W. Hardy & Co. Inc.

506

S/G P. W. Fricke, President

N.B. Immediately upon receipt, please examine the terms of this letter of credit. If after careful study you find that you are unable to comply with its terms please take the necessary steps to have the credit amended. This will avoid unnecessary delays in honoring your drafts.

507

508

Petitioner's Exhibit 34.

ASSOCIATED METALS AND MINERALS

CORPORATION

75 West Street
New York 6

March 14, 1955

Number 14438

Contract

Dear Sirs:

We take pleasure in confirming the following
509 business transaction negotiated by us to-day:

Associated Metals & Minerals Corp. 75 West St., New York 6, NY Agree to Sell

M. W. Hardy & Co. Inc., 141 Broadway, New York City Agree to Buy

Quantity, Material & Quality

2000/3000 long tons of 2240 lbs. each, quantity at seller's option, of Indian Manganese Ore of the following chemical specifications:

Mn	46% minimum
Fe	10% maximum
Si02	5.5% maximum
A1203	5.5% maximum
P	0.15% maximum

510

Maximum 10% through 20 mesh screen, maximum size to pass a 6" ring, minimum 80% over ¼" size.

Petitioner's Exhibit 34. 511

Price

:$44.50 (forty four dollars and fifty cents) per dry long ton C & F Mobile, discharge for seller's account basis 48% Mn with a premium or penalty of 50¢ per long dry ton unit or fractions thereof. Indian export tax, if any, for buyer's account.

U. S. duty for buyer's account.

Delivery

:Seller has booked for loading in Calcutta one steamer for April loading and one steamer for May loading, each for a quantity of 1000/1500 tons each. 512

Payment

:Buyer to open a letter of credit prior to loading time of the vessel, becoming available as follows:

80% against:

1) Full set of clean on board ocean bills of lading, carrier certificate or delivery order.

2) Indian weight certificate

3) Foreign analysis and moisture certificate 513

4) Provisional commercial invoice in triplicate based on dry weight and manganese content as per foreign analysis certificate.

Balance against:

1) Final commercial invoice in triplicate based on and accompanied by 2 and 3 below

2) Outturn weight certificate

3) Analysis certificate issued by Andrew S. McCreath & Son

Sampling, Weighing and Analysis

515 :The manganese ore shall be loaded aboard railroad cars at port of arrival at which time samples shall be taken by Andrew S. McCreath & Son, Harrisburg, Pa., who shall analyze and determine moisture content of same. The certificate of analysis and moisture determination as above and the certificate of railroad weights shall be final and binding upon both parties and shall be the basis for final settlement of purchase price between buyer and seller.

Cost of weighing, sampling, analysis and moisture determination shall be borne equally by buyer and seller.

516

Insurance

:Buyer to cover Marine and War Risk Insurance. In case of loss Indian weight and analysis to govern as basis for final settlement.

Petitioner's Exhibit 34. 517

Force Majeure

:The obligations of seller with respect to delivery hereunder are subject to war, acts of governments, strikes, acts of God and other contingencies beyond seller's reasonable control.

ASSOCIATED METALS & MINERALS CORP.

By H POHL
H. POHL.

ACCEPTED: 518

M. W. HARDY & CO. INC.
By P W FRICKE

519

520

Petitioner's Exhibit 35.

ASSOCIATED METALS AND MINERALS CORPORATION
75 West Street
New York 6

March 25, 1955

Number 14544

Contract

Dear Sirs:

We take pleasure in confirming the following
521 business transaction negotiated by us to-day:

Associated Metals & Minerals Corp., 75 West St., New York 6, NY Agree to Sell

M. W. Hardy & Co. Inc., 141 Broadway, New York 6, N.Y. Agree to Buy

Quantity, Material & Quality

3000 long tons of 2240 lbs. each, 10% more or less at seller's option, Manganese Ore of the following analysis:

Mn	46% minimum
522 Fe	9.5% maximum
SiO2 plus Al2O3	11.5% maximum
P	0.1% maximum

Maximum 10% through 20 mesh screen, maximum size to pass a 6" ring, minimum 80% over ¼" size.

Petitioner's Exhibit 35. 523

Price

:$44.75 (forty four dollars and seventy five cents) per dry long ton C & F Baltimore, discharge for seller's account basis 48% Mn with a premium or penalty of 50¢ per long dry ton unit or fractions thereof. Portuguese Indian export tax, if any, for buyer's account. U. S. duty for buyer's account.

Delivery

:Seller has chartered for loading in Marmagoa steamer with laydays April 20th-May 15, 1955. 524

Payment

:Buyer to open a letter of credit prior to loading time of the vessel, becoming available as follows:

80% against:

1) Full set of clean on board ocean bills of lading, carrier certificate or delivery order.

2) Indian weight certificate

3) Foreign analysis and moisture certificate

4) Provisional commercial invoice in triplicate based on dry weight and manganese content as per foreign analysis certificate 525

526 *Petitioner's Exhibit 35.*

:Balance against:

1) Final commercial invoice in triplicate based on and accompanied by 2 and 3 below

2) Outturn weight certificate

3) Analysis certificate issued by Andrew S. McCreath & Son

Sampling, Weighing and Analysis

527 :The manganese ore shall be loaded aboard railroad cars at port of arrival at which time samples shall be taken by Andrew S. McCreath & Son, Harrisburg, Pa., who shall analyze and determine moisture content of same. The certificate of analysis and moisture determination as above and the certificate of railroad weights shall be final and binding upon both parties and shall be the basis for final settlement of purchase price between buyer and seller.

Cost of weighing, sampling, analysis and moisture determination shall be borne equally by buyer and seller.

528 Insurance

:Buyer to cover Marine and War Risk Insurance. In case of loss, Portuguese Indian weight and analysis to govern as basis for final settlement.

Petitioner's Exhibit 35. 529

Force Majeure

The obligations of seller with respect to delivery hereunder are subject to war, acts of governments, strikes, acts of God and other contingencies beyond seller's reasonable control.

ASSOCIATED METALS & MINERALS CORPORATION

By H POHL.
H. POHL.

ACCEPTED 530

M. W. HARDY & Co., INC.
By P W FRICKE

Petitioner's Exhibit 36.

M. W. HARDY & CO. INC.
141 BROADWAY
NEW YORK 6, N. Y.
Telephone: WOrth 4-1550

March 22, 1955

CONTRACT 1137A 531

Messrs. Sohanlal Pahladrai, or their legal substitutes, 20 Ganga Bihar, 55 Marine Drive, Bombay, India agrees to sell and M. W. Hardy & Co. inc., 141 Broadway, New York 6, New York, U.S.A. agrees to buy the merchandise specified below on the terms and subject to the following conditions:

532 *Petitioner's Exhibit 36.*

QUANTITY:

Two thousand (2000) tons of 2240 pounds each.

PRODUCT:

Indian Metallurgical Lump Manganese Ore.

ANALYSIS:

The following analysis is the basis of Contract entered into:

Mn on dry basis 48%

533 Rejection below 46%

Fe ..... 9% maximum

A1203 ..... 4½% "

Si02 ..... 8.5% "

P ..... 0.15% "

MECHANICAL COMPOSITION:

Hard, lumpy ore and not more than 5% passing Tyler mesh 20.

PRICE:

534 U.S. $44.00 per long ton dry weight basis 48% Mn, unitage prorata, c.&f. Baltimore, discharge included.

SHIPMENT:

From any major Indian port, in one shipment, within sixtynine—days of acceptance, March 21, 1955.

Petitioner's Exhibit 36. 535

PAYMENT:

By Letter of Credit to be opened for full value of the ore in favor of Seller on date of acceptance and payable against the following documents:

1) Seller's commercial invoice covering 95% of the value of the merchandise.

2) Moisture and sampling certificates stating that the samples were drawn at time of loading on carrying vessel by V. R. Briggs or Hughes & Davis.

3) Analysis certificate by V.R. Briggs or Hughes & Davis. 536

4) On board, ocean Bills of Lading marked Freight Paid.

5) Weight Certificate by any major Indian port authority.

6) A certificate stating that the Indian Government export duty has been paid or that the material is free of export duty.

The balance of 5% is payable in the following manner upon arrival of material in the U.S.A. against the following:

1) U.S. railroad outturn weight certificates.

2) Moisture, sampling and analysis certificates by Andrew S. McCreath & Son or Booth, Garrett & Blair. 537

WEIGHTS:

The final settlement is to be based on railroad weights at the port of discharge.

538 *Petitioner's Exhibit 36.*

SAMPLING & ANALYSIS:

The ore is to be sampled, at time of discharge, by Andrew S. McCreath & Son or Booth, Garrett & Blair. The findings of the designated laboratory as regards the chemical analysis and moisture will be final for Sellers and Buyers.

REJECTION:

If the consignment does not conform to the analysis as indicated under caption "Analysis", on basis of analysis at port of loading, Buyer has the right of rejection.

539

FORCE MAJEURE:

The Seller shall not be liable for failure to make any delivery hereunder caused by or resulting from strikes, fires, floods, wars, riots, loss or destruction of the material, restrictions imposed by any Government or Governmental authority, or without limitation any other cause beyond the control of Seller, whether similar or dissimilar to the causes enumerated.

ARBITRATION:

All disputes arising out of the present contract shall be conducted at the competent Arbitration
540 Court in the U.S.A.

M. W. HARDY & Co. INC.
J. R. ODELL
Joseph R. Odell

ACCEPTED.

SOHANLAL PAHLADRAI
(Illegible)
LEGAL SUBSTITUTE.
For Continental Commercial Co.,
(Illegible.)
Partner.

541

Petitioner's Exhibit 37.

(Letterhead of Devidayal (Sales) Ltd.)

January 21, 1955.

M/s. Iida & Co., Ltd.,
Botawala Building,
Elphinstone Circle,
Bombay.

Re: Contract MN-200, now remaining cancelled.

Dear Sirs,

We have for acknowledgement your letters of the 6th and 13th instant on the subject of the above contract. 542

In reply we can only refer you to our letters of the 3rd instant and our cancellation letter of the 10th instant and repeat that we have cancelled the above contract with you on account of your failure to comply with the terms and conditions of the contract with regard to opening Letter of Credit in time and as per the terms and conditions of the contract, as already explained in our letter of the 3rd instant. Moreover, the Credit opened by you was a conditional one and as such, we could not accept such a Credit.

Now that, in any case, the contract remains cancelled, we feel that any exchange of correspondence between us is useless. 542

Furthermore, we deny the various inferences and contentions you have made in your letters of the 6th and 13th instant and reserve our right to reply to the same in detail at any time we choose afterwards.

Yours faithfully,

for DEVIDAYAL (SALES) LTD.,
sd/—Mg. Director.

544

Petitioner's Exhibit 39.

RCA RADIOGRAM

FROM HDA NEW YORK TO HDA BOMBAY

Jan. 9, 1955

REFERENCE DEVIDAYAL'S CANCELLATION. ADVISE DAILY BY MAIL DETAILS OF YOUR CONSULTATION WITH LAWYERS. CHECK AND ADVISE POSSIBILITY OF PURCHASING REPLACEMENT. WILL ADVISE YOU IN FEW DAYS ARBITRATION SITUATION IN NEW YORK.

545

Petitioner's Exhibit 40.

(RADIOGRAM FROM HDA, BOMBAY, TO HDA, NEW YORK)

January 11, 1955

RE ADDITIONAL BID. NO FIRM HERE ABLE TO MAKE OFFER. PLEASE WAIT LONGER. REGARDING NISSHOO, NOT ABLE TO FIND SHIPPER, SO PRESUME IT JUST A RUMOR. RECHECK AND ADVISE. REFERENCE DEVIDAYAL, TRYING OUR BEST. DO NOT WORRY. IMPOSSIBLE TO PURCHASE REPLACEMENT.

546

Petitioner's Exhibit 42.

(MACKAY RADIOGRAM FROM HDA NEW YORK TO HDA, BOMBAY)

Feb. 2, 1955

HARDY INFORMS US THERE IS FLOATING CARGO FOR SALE AND SUGGESTS WE BUY THIS AS REPLACEMENT. ONLY DETAIL KNOWN IS THAT QUALITY ACCEPTABLE. THIS CARGO PRESUMABLY LOADED AT BOMBAY. CAN YOU INVESTIGATE THIS NEWS

Petitioner's Exhibit 43.

547

(MACKAY RADIOGRAM FROM HDA NEW YORK TO HDA, BOMBAY)

Feb. 9, 1955

NO REPLY RECEIVED FROM DEVIDAYAL. OWNER OF FLOATING CARGO IS ASSOCIATED METALS, SAID CARGO ALREADY SOLD, BUT WE ARE STILL NEGOTIATING FOR IT. CONTINUE YOUR EFFORT TO OBTAIN OFFER IN ANY QUANTITY.

Petitioner's Exhibit 44.

548

(RADIOGRAM FROM HDA, BOMBAY to HDA, NEW YORK)

1955 FEB 14 AM 10 53

FACING DIFFICULTY IN PERSUADING DEVIDAYAL REGARDING FLOATING CARGO WE PRESUME IT SOME NEW YORK FIRM'S SPECULATIVE PURCHASE HENCE DIFFICULT TO ASCERTAIN FROM OUR SIDE. PLEASE CONTACT M. GOLODES. WE ARE STILL TRYING TO ARRANGE REPLACEMENT CARGO. DEVIDAYAL'S SOLICITOR IN LETTER DATED 8TH REPLIED TO OUR ATTORNEY INSISTING MERELY THAT DEVIDAYAL NOT AT FAULT BUT MAKING NO REFERENCE TO QUESTION OF ARBITRATION. THIS LETTER JUST RECEIVED FROM OUR ATTORNEY THIS MORNING. ADVISE SITUATION YOUR SIDE. 549

550

Petitioner's Exhibit 45.

(MACKAY RADIOGRAM FROM IIDA. NEW YORK TO IIDA. BOMBAY)

Feb. 14, 1955

APPLIED TO COURT TODAY FOR APPOINTMENT OF ARBITRATOR. DEVIDAYAL TO BE SUMMONED MARCH 8TH OFFICIALLY DECIDED. NECESSARY DOCUMENTS AIRMAILED BY OUR LAWYERS TO DEVIDAYAL, ALSO COPIES TO YOUR OFFICE. PROSPECT NIL ON NEGOTIATING FLOATING CARGO OF ASSOCIATED METALS.

551

Petitioner's Exhibit 55.

(Letterhead of Iida & Co. New York, Inc.)

February 7, 1955

M. W. Hardy & Co., Inc.
141 Broadway
New York 6, N. Y.

Att: Mr. Joseph R. Odell

Gentlemen:

552 We refer to the several telephone conversations between your Mr. Joseph R. Odell and Mr. F. L. Rodney.

We instruct you, herewith, to purchase 8000 tons of Indian Manganese Ore, on the terms and as per analysis shown in our Contract No. 1137 dated December 2, 1954, subject, however, to our approval of final price.

Petitioner's Exhibit 55. 553

Your indication of $44.00 per ton CIF Mobile, discharge included, appears high.

Please keep us informed of developments.

Yours very truly,

IIDA & CO. NEW YORK, INC.
TEIJI TAMARU
President

TT:EH
cc: Benjamin Schwartz Co.

554

Petitioner's Exhibit 56.

(MACKAY RADIOGRAM FROM IIDA, BOMBAY TO IIDA, NEW YORK)

FEB 10, 1955

THERE IS A POSSIBILITY TO BOOK 48/46 FE 9 SILICA 10 ALUMINA 4 PHOS 0.15 8000 TONS CIF MOBILE APR./MAY DOLLARS 44 IF YOU CAN BID.

555

556

Petitioner's Exhibit 57.

BENJAMIN SCHWARTZ COMPANY
11 West 42nd Street
New York 36, N. Y.

March 3, 1955

Iida & Co., N. Y. Inc.
25 Broad Street
New York 4, N. Y.

Attention Mr. Teiji Tamaru.

557 Re: Hardy Contract #1137
Manganese Ore.

Gentlemen:

We refer to our exchange of letters of November 16 and 17, 1954 and to our recent talks concerning our fee, earned in connection with subject contract.

We suggest a fee of $2,750.00, out of which we shall arrange to satisfy the third party mentioned in our letter of November 16, 1954.

It is understood that this fee will be accepted in full settlement of all claims arising out of the
558 subject contract.

Yours sincerely

Benjamin Schwartz Company
Benjamin Schwartz

FLR:lim

559

Petitioner's Exhibit 58.

(Letterhead of Iida & Co., New York, Inc.)

April 12, 1955

Benjamin Schwartz Co.
11 West 42nd Street
New York, N. Y.

Re: Hardy Contract #1137
Manganese Ore

Gentlemen:

Reference is made to your letter of March 3, 1955, and to our subsequent conversations during which it has been agreed that the fee for the services referred to, is to be set at $1000. 560

We confirm that on or before May 2nd, 1955, we shall pay the sum of $1000 to you, with the understanding that this payment will constitute full settlement.

Very truly yours,

IIDA & CO. NEW YORK, INC.
TEIJI TAMARU
President

TT:EH 561

Petitioner's Exhibit 59.

Check for $1,000.00, from Iida & Co. New York, Inc. to Benjamin Schwartz Co., dated May 2, 1955.

(Bound in opposite.)

BY ENDORSEMENT THIS CHECK IS ACCEPTED IN FULL PAYMENT OF THE FOLLOWING ACCOUNT

DATE	AMOUNT
Re per our letter dated March 19 re Contract Mar 11 57	
#5-5006	
TOTAL OF INVOICES	
LESS % DISCOUNT	
LESS	
TOTAL DEDUCTIONS	
AMOUNT OF CHECK	

IF INCORRECT PLEASE RETURN. NO RECEIPT NECESSARY

38

IIDA & CO. NEW YORK, INC.
25 BROAD STREET, NEW YORK 4, N. Y.

No. 1956

1-8
210

PAY TO THE ORDER OF S. New York May 2, 1955

Benjamin Schwartz Co. $1,000 00

One Thousand & 00/100 DOLLARS

TO
THE NATIONAL CITY BANK OF NEW YORK
TWENTY-SIX BROADWAY BRANCH
TWENTY-SIX BROADWAY AT BEAVER STREET
NEW YORK, N. Y.

IIDA & CO. NEW YORK, INC.

G.W.R.

Authorized Signature

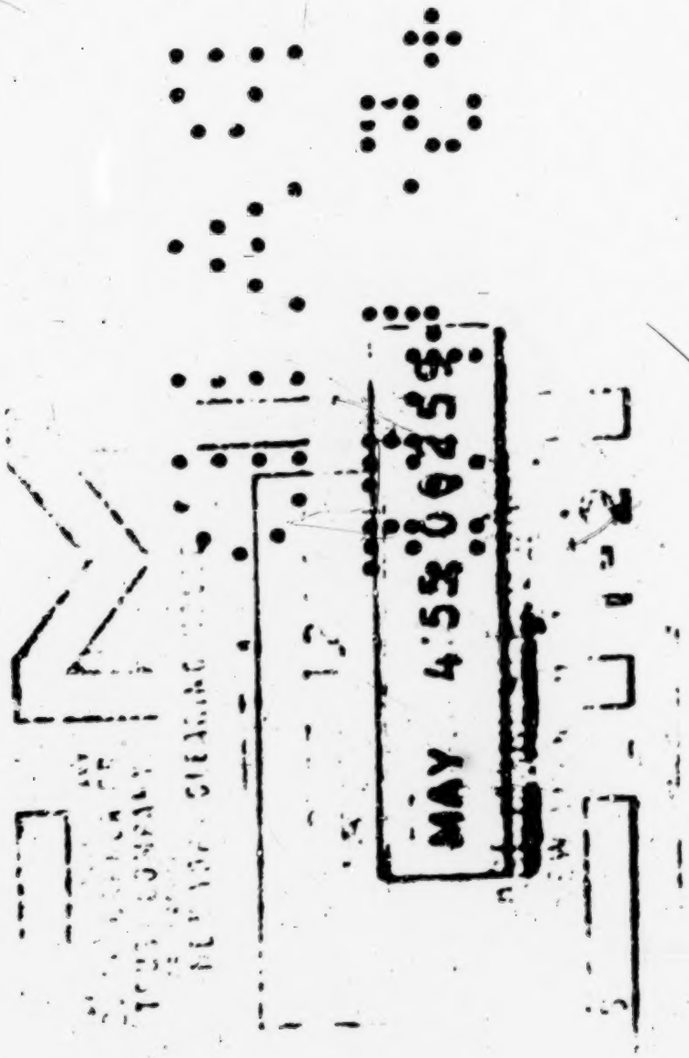
Peterborough 445
6/24/55 OK

(FRONT)

Petitioner's Exhibit 59

(Back)

52 PAY TO THE ORDER OF 52
BANK OF THE MANHATTAN COMPANY
BENJAMIN SCHWARTZ COMPANY



568

Petitioner's Exhibit 60.

(Letterhead of Iida & Co., New York, Inc.)

March 22, 1955

Karel A. Jablonka
120 West 42nd St.
New York 36, N. Y.

Re: Hardy Contract #1137
8,000 tons of Indian
Manganese Ore

Gentlemen:

569 In connection with the above contract and referring to the letter from Benjamin Schwartz Company, New York, dated November 16, 1954, we herewith enclose our check in the amount of $1,000.00.

It is our understanding that upon receipt of this remittance, you will release Benjamin Schwartz Company from any further liability to you with regards to the above contract.

Very truly yours,

IIDA & CO. NEW YORK, INC.
TEIJI TAMARU
570 President

TT:EH

Petitioner' Exhibit 61.

Check for $1,000.00, from Iida & Co. New York, Inc. to Karel A. Jablonka, dated March 22, 1955.

(Bound in opposite.)

38

BY ENDORSEMENT THIS CHECK IS ACCEPTED IN FULL PAYMENT OF THE FOLLOWING ACCOUNT	
DATE	AMOUNT
Study Contract #1107	
TOTAL OF INVOICES	
LESS % DISCOUNT	
LESS	
TOTAL DEDUCTIONS	
AMOUNT OF CHECK	
IF INCORRECT PLEASE RETURN NO RECEIPT NECESSARY	

IIDA & CO. NEW YORK, INC.
25 BROAD STREET, NEW YORK 4, N. Y.

No. 1801
1-8
210

PAY TO THE ORDER OF

NEW YORK March 22 19 VV $ 1,000.00

Vera & Jablonka.

One thousand only C.P.A. DOLLARS

TO
THE NATIONAL CITY BANK OF NEW YORK
TWENTY-SIX BROADWAY BRANCH
TWENTY-SIX BROADWAY AT BEAVER STREET
NEW YORK, N. Y.

Peletmes X6
6/21/5? 05

IIDA & CO. NEW YORK, INC.

JAMES BARR P.O. 2 NEW YORK

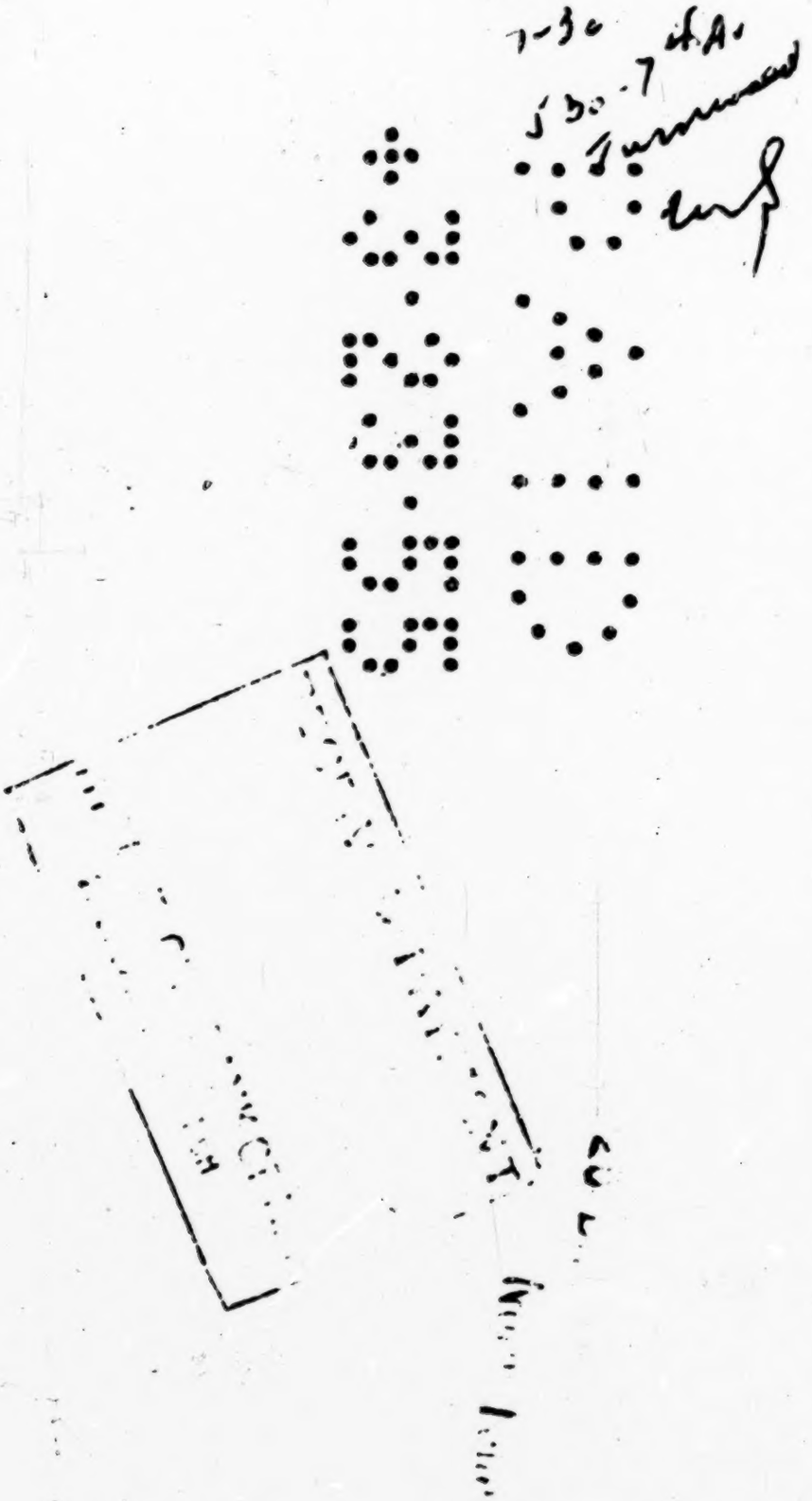
Authorized Signature

Petitioner's Exhibit 61

(Back)

Karel A. Bellemans

120 W. 42 St.
N.Y. 18 N.Y.



574

Award of Arbitrator.

SUPREME COURT

OF THE STATE OF NEW YORK.

County of New York.

[Same Title.]

Pursuant to an agreement to arbitrate contained in a contract made and executed on December 8, 1954 between Iida & Co., New York, Inc. (Petitioner) and Devidayal (Sales) Ltd. (Re-
575 spondent), and the order of arbitration of this Court, dated March 11, 1955, appointing me as arbitrator to hear and decide any and all controversies, disputes and matters of difference which may have arisen between the parties under said contract of December 8, 1954, and my oath having been duly taken, and the parties having stipulated that Petitioner should pay for the cost of the original transcript of the stenographer's minutes, the arbitrator's copy thereof and Petitioner's copy thereof and that Respondent should pay for Respondent's copy thereof and that the successful party may tax as a disbursement the amounts paid by it for the stenographer's minutes, and
576 the parties having further stipulated that the expenses of the hearing room should be paid by Petitioner and be taxed as a disbursement if Petitioner is the successful party, and the parties having further stipulated that the statutory fees relating to the charges of the arbitrator be waived and that the said charges should be fixed upon the basis of a fair and reasonable value of the services rendered and should be paid by Petitioner and

taxable as a disbursement if an award is made in favor of the Petitioner, and full and complete hearings having been duly had and testimony taken on June 6, 8, 10, 15, 17, 21 and 30 and July 1, 6, 19, 26 and 27, and all of the facts and circumstances having been examined into, and after a full and complete consideration of all the evidence taken and the briefs submitted by the attorneys for the respective parties, and upon my opinion hereto annexed and made a part hereof, I do hereby render a decision and award as follows:

1. Petitioner, Iida & Co., New York, Inc., substantially performed the terms and conditions of the contract on its part. 578

2. Respondent, Devidayal (Sales) Ltd., breached the contract.

3. As a result of Respondent's breach of the contract, Petitioner was damaged in the sum of $46,800.00, with interest thereon from March 31, 1955.

4. Petitioner incurred travel expenses of $1,152.07 for a round trip from Bombay, India to New York, N. Y. for the witness Hiroshi Munakata and expenses for his maintenance in New York amounting to $900.00, computed at the rate of $10.00 per day for 90 days. 579

Therefore, I, the undersigned arbitrator, do hereby award to Iida & Co., New York, Inc., Petitioner, the sum of $46,800.00 plus $2,052.07, totaling $48,852.07, with interest on the sum of $46,-

800.00 from March 31, 1955, to be paid by Devidayal (Sales) Ltd., Respondent.

And I, the undersigned arbitrator, do fix my fee as arbitrator in the sum of $3,500.00 and do direct the payment of said sum to me by Iida & Co., New York, Inc., Petitioner.

And I, the undersigned arbitrator, do hereby award the costs and disbursements of this proceeding to Iida & Co., New York, Inc., Petitioner, which may tax as disbursements, the cost to it of the stenographer's minutes, the expenses of the
581 hearing room and the arbitrator's fee, and such other costs and disbursements as may be permitted by the Civil Practice Act.

This award is to be filed in the office of the Clerk of the County of New York and judgment is to be entered thereon as in an action in the Supreme Court in said County.

Dated: New York, N. Y.,
September 28, 1955.

WILLIAM A. HYMAN,
Arbitrator.

(Sworn to September 28, 1955.)
582

Opinion of Arbitrator.

SUPREME COURT

OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

[SAME TITLE.]

By WILLIAM A. HYMAN, Arbitrator.

BUCHTER, RATHHEIM, ABRAMS & HOFFMAN, Esqs., Attorneys for Petitioner, by SIDNEY ABRAMS, Esq., and ALVIN L. KASSEL, Esq., of Counsel. 584

SCHWARTZ & NAIDICH, Esqs., Attorneys for Respondent, by ARNOLD NAIDICH, Esq., and HERBERT LEVENSON, Esq., of Counsel.

This opinion is part of the Award to which it is attached.

Hearings were held and testimony taken on 12 days and one evening session. The transcript of the testimony consists of 1023 typewritten pages. 102 exhibits were introduced into evidence by Petitioner and 27 exhibits were introduced by Respondent. Two of the witnesses came here 585 from Bombay, India, in order to testify. The amount in controversy is substantial, Petitioner claiming damages in the sum of $73,866.19.

Counsel for both sides labored hard and long and displayed great skill in the presentation of their respective sides of the matter. Their briefs were thorough and explicit.

However, the above stated matters and the importance of the case to the parties do not furnish the principal reason for this opinion.

My main reason is that I believe that it is the duty of an arbitrator to set forth in detail his findings and the reasons for his award, in order that the parties may know whether or not the decision rendered is sound and just.

An arbitrator should not hide behind the fact that his decision is conclusive where his award does not on its face demonstrate palpable error
587 of fact or law.

The law concerning the conclusiveness of an arbitrator's decision is long established. It was stated in *Fudickar* v. *Guardian Mutual Life Ins. Co.*, (1875) 62 N. Y. 392, 399-402, as follows:

> "It is the general doctrine pervading our jurisprudence on the subject, that the decision of an arbitrator in a matter within his jurisdiction is final and conclusive between the parties. The jealousy with which, at one time, courts regarded the withdrawal of controversies from their jurisdiction by the agreement of parties, has yielded to a more sensible view, and arbitrations are now en-
> 588 couraged as an easy, expeditious and inexpensive method of settling disputes, and as tending to prevent litigation. The arbitrator is a judge appointed by the parties, he is by their consent invested with judicial functions in the particular case; he is to determine the right as between the parties in respect to the matter submitted, and all questions of fact or law upon which the right depends are,

under a general submission, deemed to be referred to him for decision. The court possesses no general supervisory power over awards, and if arbitrators keep within their jurisdiction their award will not be set aside because they have erred in judgment either upon the facts or the law. If courts should assume to rejudge the decision of arbitrators upon the merits, the value of this method of settling controversies would be destroyed, and an award instead of being a final determination of a controversy would become but one of the steps in its progress. The courts 590
in this State have adhered with great steadiness to the general rule that awards will not be opened for errors of law or fact on the part of the arbitrator. Shepard v. Watrous, 3 Cal. 166; Cranston v. Kenny, 9 Johns. 212; Jackson v. Ambler, 14 id. 105; Mitchell v. Bush, 7 Cow. 185; Emmett v. Hoyt, 17 Wend. 410; Winship v. Jewett, 1 Barb. Ch. 173; Perkins v. Giles, 50 N. Y. 228.

"The general principle is subject to the qualification that awards may be set aside for palpable error of fact, like a miscalculation of figures, or mistake of that nature. It may also be set aside for error of law, when 591
the question of law is stated on the face of the award, and it appears that the arbitrators meant to decide according to the law but did not. In both these cases the award is not what the arbitrators themselves intended. It is not in fact their judgment; for except for the mistake, the award would have been different. But it is held, in accordance with

what seems to be a just view of the subject, that arbitrators may, unless restricted by the submission, disregard strict rules of law or evidence and decide according to their sense of equity. Kleine v. Catara, 2 Gall. 61; Boston Water Power Co. v. Gray, 6 Metc. 131; Tyler v. Dyer, 13 Me. 41; Hazeltine v. Smith, 3 Vt. 535; Cushman v. Wooster, 45 N. H. 410; Story Eq. Jur., § 1454. If, for example, a claim for compensation for the erection of a building by one person on the land of another, under a contract which, by technical construc-
593 tion, makes the right to compensation dependent upon full performance by the builder, is referred to arbitration, and it turns out that there has been a failure by the builder to comply with the contract in some particulars, although the benefit which the other party has received from part performance is greater than the injury sustained by the failure to perform the contract in full, the arbitrator may, I think, where the submission is general, award the excess of benefit, although in an action at law upon the contract he could not, within the decision in Smith v. Brady, 17 N. Y. 172, 72 Am. Dec. 442, recover.

594 "It must, as has been already observed, appear upon the face of the award that the arbitrators have mistaken the law to enable the court to set aside the award on that ground. If it appear from the award that the arbitrators intended to decide the case according to the law, and the grounds for their decision are set out, which in law do not justify it, the case is brought within the

exception to the general rule, and the court will set it aside. But it is not necessary that it should appear by express statement in the award that the arbitrators intended to decide according to law in order to give the court the power of review. It is sufficient if this be shown by clear and necessary inference.

"It is a settled principle governing this subject, and which ought never to be lost sight of, that all reasonable intendments and presumptions are indulged in support of awards. The party alleging error of law must be able to point to the award and say that the arbitrator, as appears from the award itself, intended to decide the case according to law, and has mistaken it, and that except for this mistake his award would have been different." 596

In line with the above it would be simple for an arbitrator to merely announce an award without stating in detail the facts found by him, his conclusions and his reasons.

However, such an award, would not do complete justice to the parties, nor would it serve to inspire public confidence in the remedy of arbitration.

People engaged in business are resorting more and more to the remedy of arbitration, instead of litigating their differences in the courts. They realize that in court litigation they will, in most instances, get sound decisions based on established law and principles. Nevertheless, because of the long delays attendant upon court litigation, many business people are seeking the speedier method 597

of arbitration. However, the remedy of arbitration cannot be a satisfactory substitute, and will fall into disrepute and disuse, if the arbitrators do not render sound decisions of the quality which the people expect from our courts. If arbitrators act capriciously or merely serve as compromisers, or if arbitrators do not apply sound legal and equitable principles, then we will soon find that disputes arising from commercial transactions will no longer be arbitrated but will be back in the courts.

Accordingly, I have approached this matter with
599 the point of view that, as an attorney acting as arbitrator appointed by the Supreme Court, I should decide the issues with the same high regard for principles of substantive law, justice and equity as would a Justice of the Court trying the case without a jury, and that I should set forth in full the reasons for my award, so that the parties may be fully apprised thereof and if there is any palpable error of fact or law the award may be set aside or modified.

Petitioner, a New York corporation, claims that it was damaged by the non-delivery of manganese ore purchased from Respondent, an Indian corporation. Respondent claims that non-delivery was
600 justified because Petitioner failed to open a letter of credit in accord with the contract terms. Respondent claims that the letter of credit contained material variations from the contract. Petitioner claims that some of the alleged variations were not variations at all and that the others were immaterial and insubstantial. Petitioner also claims that it was the general custom and usage in international trade and in the Indian ore trade, as well

as the custom and usage between the parties themselves as established in prior transactions, for the beneficiary of a letter of credit to call attention to any variances between the letter of credit and the contract, and to request the amendments necessary to conform the letter of credit to the contract, and for the buyer to have the requested amendments made.

Petitioner claims that Respondent cancelled the contract instead of requesting amendments to the letter of credit, which would have been effected, because the market price of the goods rose sharply and steadily between the date of the execution of 602
the contract and the date of its cancellation by Respondent and that the cancellation was not in good faith.

The issues, therefore, are:

1. Did Petitioner substantially perform the terms and conditions of the contract on its part:

2. Did Respondent breach the contract:

3. If Petitioner substantially performed the contract and Respondent breached the contract, what damages did Petitioner sustain by reason of Respondent's breach?

603

The parties entered into a written contract on December 8, 1954 for the sale by Respondent to Petitioner of 8,000 long tons, 10% more or less at seller's option, of Indian manganese ore. The specifications included a minimum manganese content of 46% and a maximum phosphorus content of 0.18%. Shipment was to be made during January/March, 1955, in minimum monthly quantities

of 2500 tons or alternatively as one shipload, at seller's option, in liner or charter vessel at seller's option. The price was $35.25 per dry long ton, C. I. F., Mobile, with freight basis at $11.50 maximum, liner vessel, increase if any to buyer's account. Payment was to be made by confirmed irrevocable letter of credit to be opened in favor of the seller by the buyer, for 110% C.I.F. value of the goods, definitely before December 20, 1954. The letter of credit was to remain valid until the determination of the out-turn sampling, weighment and analysis of the goods and final settle-
605 ment of account.

The freight was to be paid by the buyer, the contract providing (clause 9-b) "'Freight to collect', Bills of Lading to be obtained for negotiation by the Sellers in case of liner steamers or alternatively the Buyers shall pay the freight in New York immediately upon completion of loading if charter vessel, in U. S. Dollars."

Insurance was to be covered by the seller up to 110% of the invoice value, with claims payable in Dollars in New York.

Following the execution of the contract there was considerable correspondence between the par-
606 ties. On December 10, 1954 Petitioner wrote to Respondent asking it to invoice the ore at a unit price of $36.00 per dry long ton C.I.F. Mobile and to remit the difference of 75¢ between the contract price and the invoice price to Petitioner's New York office on completion of the shipment. Respondent consented to do this by countersigning the letter.

On December 13, 1954 Petitioner advised Respondent that Petitioner's New York office would open a letter of credit as follows: "Unit Price: $36.00 C.I.F. Discharged Mobile per ~~DLT~~ less approximate freight $12.25"; that in case Respondent got cheaper freight the amount of the letter of credit would be increased accordingly; that Respondent should make one draft for 100% of the invoicing amount at 60 days sight and another draft at sight for exchange difference and stamp duty, instead of one sight draft as provided in the contract; and that according to Respondent's request Petitioner has asked its New York office 608
to arrange a guarantee letter for the freight payment in New York.

On December 14, 1954 Respondent wrote two letters to Petitioner. ~~One requested the Petitioner~~ to open the letter of credit to cover the contract immediately. The other letter, responding to Petitioner's letter of December 13, stated that Respondent had sold the material at $35.25 per dry long ton, C.I.F. Mobile and not C.I.F. discharged Mobile, with freight basis of maximum $11.50 per ton liner;—that if Petitioner was going to open a letter of credit in Respondent's favor for the 110% value of the F.O.B. price, the credit must be opened at the price of $35.25 C.I.F. 609
Mobile per ton less $11.50 per ton being the rate maximum provided for the freight, i.e., the credit must be at $23.75 per ton F.O.B. Bombay, liner terms; that Respondent could not agree to the credit being opened at $36.00 C.I.F. discharged Mobile per dry long ton less approximate freight of $12.25 per ton, although for all practical purposes deducting $12.25 from $36.00 per ton

amounts to the same thing; that Petitioner will have to execute a guarantee bond in Respondent's favor through a bank for the approximate value of the freight for 8,000 tons, plus 10% at the rate of $11.50 per ton provisionally; that Respondent had no objection to the letter of credit providing for draft to be drawn at 60 days sight and another draft at sight for the exchange difference and stamp duty; that the letter of credit should also mention that if the freight is booked by Respondent at a rate lower than $11.50 per ton the credit value will be accordingly increased, increasing the
611 F.O.B. value per ton, thus giving Respondent the benefit for having booked the freight at a rate lower than $11.50 per ton.

On December 16, 1954 Petitioner replied to Respondent that the provision in the letter of credit "Unit Price $36.00 C.I.F. discharged Mobile per DLT less approximate freight $12.25" was merely due to the technical difficulty of opening the credit and that the practical unit amount comes to $23.75, so that Respondent would have no difficulty in invoicing at $36.00 C.I.F. and negotiating the documents after shipment according to the contract and the letter of December 10 countersigned by Respondent; that since the freight rate was not
612 yet certain they were mentioning it as approximate and if Respondent gets cheaper freight the letter of credit would be increased as promised; that Petitioner's New York office will give a guarantee to the agent of the steamship company of New York as soon as Respondent advised Petitioner of the steamer; that the above arrangement of opening credit having been advised by the Bank of Tokyo Limited, through whom Respondent was

getting the credit, if Respondent thought it difficult please consult said bankers in Bombay.

On the same date (December 16, 1954) Petitioner, in New York, applied to the New York branch of the Bank of Tokyo, Ltd. for the letter of credit. On the same day, December 16, Petitioner sent a telegram to Respondent that the letter of credit had been opened and that particulars were being forwarded by air mail. This telegram was received by Respondent on December 17 and on December 18 Respondent wrote to Petitioner acknowledging receipt of the telegram. On December 18 the Bank of Tokyo, Bombay branch, 614
sent a letter to Respondent, received by the latter about December 20, stating that its New York agency had opened an irrevocable credit in favor of the Respondent for $209,000.00 covering Indian manganese ore and that details were being air mailed.

On December 22, 1954 Respondent wrote to Petitioner, replying to Petitioner's letter of December 16, that insofar as Petitioner had confirmed that it was opening the credit at $36.00 C.I.F. discharged Mobile less approximate freight at $12.25 only due to the technical difficulty of opening the credit, Respondent had no objection to Petitioner so doing, but that the credit must be opened at 615
$36.00 per ton for delivery C.I.F. Mobile and not C.I.F. discharged Mobile; that Respondent was not responsible for discharge expenses at the destination which would have to be borne by Petitioner if Respondent did not succeed in booking freight per liner vessel, and similarly the loading expenses at the port were also to be borne by Respondent; that the letter of credit should stipu-

late that if Respondent secures freight at a cheaper rate the F.O.B. value is to be increased proportionately; that Respondent could not arrange for the booking of freight on liner vessel or chartering a vessel until it received the guarantee of Petitioner's bank for the freight payment calculated at approximately $12.25 per ton; that if this guarantee bond is not given Petitioner should book the necessary freight itself for the shipment of the whole quantity during early March, 1955; that the other matters stated in Petitioner's letter of December 16, concerning
617 the remittance of the commission to Petitioner's New York office and consulting the Bank of Toyko concerning the letter of credit, would have to await the detailed advice of the credit from the Bank of Tokyo, Ltd.

On December 27, 1954 Petitioner wrote to Respondent, replying to Respondent's letter of December 22, stating that C.I.F. discharged Mobile and C.I.F. Mobile have the same meaning; that the stevedoring charges at destination were to be borne by the shipper and the charges of shoremen to be borne by the consignee; that the same thing happened during the course of the parties' contract involving a ship called the "Andreas G"; that
618 in no case of C.I.F. contract does loading expense at the port of loading have to be borne by the buyer; that the Bank of Tokyo has advised that no stipulation can be made in the letter of credit to the effect that if the seller secures the freight at a cheaper rate the F.O.B. value is to be increased proportionately, and in this respect Petitioner's promise is enough; that Petitioner is not bound to issue a guarantee bond in favor of Re-

spondent for the freight payment at the destination country; that Petitioner has tried to do this, but its New York office has advised that it was impossible to do so and will guarantee the freight payment to the shipping company's New York office as soon as Respondent advises Petitioner of the steamer; and that Petitioner cannot accept Respondent's request to book the necessary freight itself.

On January 3, 1955 Respondent wrote to Petitioner, replying to Petitioner's letter of December 27, stating that Respondent did not agree with Petitioner's interpretation of C.I.F. Mobile and 620
C.I.F. discharged Mobile; that Respondent was not responsible for bearing the stevedoring charges either at the loading or at the discharging port; that Respondent could not accept Petitioner's letter promise to increase the F.O.B. value if the freight was secured at a rate of less than $11.50 per ton; that to avoid these complications please open the letter of credit as per the contract terms; that Respondent does not require any guarantee bond from Petitioner; that Respondent is still awaiting the confirmatory detailed advice of the letter of credit which has not yet been received and that if Respondent does not receive the letter of credit immediately according to the terms and conditions of the contract Respondent will 621
have to treat the contract as cancelled, holding Petitioner responsible for the consequences resulting from breach of contract.

On January 6, 1955 Petitioner wrote to Respondent, replying to Respondent's letter of January 3, reaffirming Petitioner's interpretation that C.I.F. Mobile and C.I.F. discharged Mobile had

the same meaning and that the buyer in a C.I.F. contract did not have to pay the costs of loading at the port of shipment; and further stating that the letter of credit was opened in accordance with the letter of December 10 which was countersigned by Respondent; that Petitioner has not deviated from the terms of the contract; that the shipment time is passing and unless Respondent arranges for shipment Respondent will have to be responsible for all the consequences.

On the same day, January 6, 1955, Respondent received the letter of credit from the Bank of
623 Tokyo, Ltd., Bombay office.

On the same day Respondent wrote to the bank that the terms and conditions of the letter of credit were not in accord with the terms and conditions of the contract, that the credit was not acceptable and that the Respondent was taking up the discrepancies directly with the Bombay representative of Petitioner.

On the same day, January 6, 1955, Respondent wrote to Petitioner that it had received the confirmation advice of the letter of credit; that on going through the terms and conditions it found that there are many stipulations in the letter of
624 credit which are not in accordance with the terms and conditions of the contract; that Respondent has therefore written to the Bank of Tokyo that the credit was not acceptable; that it was incumbent upon Petitioner to open the credit as per the terms and conditions of the contract definitely before December 20 and since it had failed to do so Respondent treated the contract as formally cancelled.

Mr. Amirchand Gupta, Managing Director of Respondent, testified that immediately upon receiving the letter of credit and reading it he had telephoned to Mr. Hiroshi Munakata, the Bombay representative of Petitioner, and advised him in detail of the respects in which the letter of credit was not in conformity with the contract terms, and had requested amendments immediately, and that Mr. Munakata had replied that it was out of his power to make any amendments.

Mr. Gupta also testified that it was immediately after this conversation that he wrote the letters of January 6, 1955 to the Bank of Tokyo, Ltd. and 626
to Petitioner.

Mr. Munakata denied that he had ever had any such telephone conversation with Mr. Gupta, and testified that he had full authority to make any amendments to the letter of credit that Respondent might have requested and that there was no request for amendments made by Mr. Gupta on January 6.

The letters written by Mr. Gupta to the Bank of Tokyo and to Petitioner were written after the alleged telephone conversation. Yet, the letter to the Bank of Tokyo states that Respondent was taking up the matter directly with the Bombay 627
representatives of Petitioner. This seems inconsistent with Mr. Gupta's testimony that there had already been a telephone conversation with Mr. Munakata in which Mr. Gupta had specified the discrepancies and Mr. Munakata had refused the requested amendments. Furthermore, the letter of January 6, 1955 by Respondent to Petitioner, notifying Petitioner of the cancellation of

the contract, makes no reference whatsoever to the alleged conversation. It is improbable that it would not have been mentioned had such a conversation taken place.

Moreover, it is apparent that the parties had written copiously to each other with regard to the contract and the letter of credit, and Respondent, in line with its prior conduct, probably would have written a letter discussing in full the claimed discrepancies between the letter of credit and the contract and Mr. Munakata's refusal to make requested amendments, had there been such a tele-
629 phone conversation.

I believe that the documentary proof weighs in favor of the conclusion that this conversation did not take place in the manner claimed by Mr. Gupta, who was evidently confused concerning the incident. I do not believe, for one instant, that Mr. Gupta intentionally misstated any fact, but I do believe that such mistake was due to the faults of memory and lapse of time. In the absence of any record to support, directly or indirectly, the alleged conversation I must find in favor of Petitioner's version.

I also find that it was and is the custom in
630 international trade and in the Indian ore trade for the seller to request the buyer to correct any discrepancies between the letter of credit and the contract and for the buyer to have such requested amendments made by the issuing bank; that this custom arose out of the necessity of protecting and preserving international trade; and that this need was created by the great frequency with which letters of credit differed in terms and termi-

nology from contract provisions because of language differences. Although persons of different nationalities used English as a medium of commerce their use of the language was handicapped to some degree by the differences in connotation which various words had for nationals of different countries. Out of necessity—to protect and preserve the trade—the custom arose for the buyer to request that discrepancies in the letter of credit be conformed to the terms of the contract and for the buyer to have the amendments made. That this custom existed was admitted by both sides herein. 632

Respondent claims, nevertheless, that it was fully justified in cancelling the contract and not delivering the ore because the letter of credit contained the following material variations from the contract:

1. The price stated in the letter of credit was "U. S. $36.00 per dry long ton, C. I. F. Mobile discharged, less freight approximately U. S. $11.50 per dry long ton"; whereas the price in the contract was "U. S. $35.25 per dry long ton, C. I. F., Mobile, with freight basis at $11.50 maximum, liner vessel, increase if any to Buyer's account". 633

2. The letter of credit required shipment "not later than February 28, 1955 for 8,000 dry long tons, 10% more or less, or January/February/March, 1955 in minimum monthly quantities of 2,500 dry long tons for a total of 8,000 dry long tons, 10% more or less, at shipper's option": whereas the contract permitted shipment during

January through March, 1955 in minimum monthly quantities of 2,500 tons or alternatively as one shipload, at Seller's option.

3. The letter of credit was opened for 110% of the F. O. B. value of the goods, based on $23.75 per ton, for a total of $209,000.00; whereas the contract required that the letter of credit be opened for 110% of the C. I. F. value of the goods, based on $35.25 per ton, for a total of $310,200.00.

635 4. The letter of credit was received by Respondent on January 6, 1955; whereas the contract required that it had to be opened definitely before December 20, 1954.

5. The letter of credit had an expiration date of April 7, 1955, whereas under the contract the letter of credit was to remain valid until the determination of the out-turn sampling, weighment and analysis of the goods and final settlement of account.

6. The letter of credit provided that payment was to be made on 90 days sight draft without provision for any other drafts for exchange differences; whereas the contract provided for payment on sight draft (subsequently amended to 60 days sight draft, plus another sight draft for exchange difference and stamp duty).

636

7. The letter of credit provided for insurance to be covered with a first class U. S. or British insurance company; whereas the contract did not limit the insurance to a U. S. or British insurance company.

The above stated alleged discrepancies between the letter of credit and the contract will be discussed in their order, because if there was any material discrepancy which Petitioner refused to amend at Respondent's request, then Respondent was justified in cancelling the contract and not delivering the goods (Bennett vs. Kazvini, 119 N. Y. S. 2d 530; Catz American Co. vs. March, 272 App. Div. 134).

1. I find that there is no material discrepancy between the unit price stated in the letter of credit and the unit price stated in the contract. 638
There is a difference in wording, but the meaning of the two clauses is the same.

Respondent objects to the insertion of the word "discharged" after "C.I.F., Mobile", contending that this imposed a greater liability and obligation on Respondent and destroyed the entire pricing basis of the contract with respect to the freight cost.

On the contrary, the insertion of the word "discharged" imposed no greater liability and obligation on Respondent and made no substantial change in the pricing basis of the contract with respect to the freight cost, as shown by the testimony of some of Respondent's own witnesses. 639

Ernest Frederick Guttman, called as an expert witness by Respondent, testified that the phrase "with freight basis at $11.50 maximum, liner vessel, increase if any to buyer's account", was just a mathematical way of determining the price and would apply whether the goods were shipped by liner vessel or by charter vessel; that the cost

of the freight would be determined on liner terms, whether the goods had been shipped by liner or by charter vessel, and that liner terms included loading and unloading charges (s.m.p. 452-459), and that under the contract in question the freight rate, which was on liner terms, included discharge costs (s.m.p. 484).

Mr. Gupta, Respondent's Managing Director, testified that C.I.F. Mobile, liner terms, meant that the loading and unloading expense was borne by the steamship (s.m.p. 645), that under this liner terms contract the freight paid to the steam-
641 ship company covered the loading charge and the discharge costs (s.m.p. 646) and that liner terms meant that the steamship would deliver the goods at the port of destination free of charge to the shipper (s.m.p. 649); and that discharge means that the cargo is unloaded (s.m.p. 651).

In Respondent's letter of December 22, 1954 to Petitioner, Mr. Gupta had insisted that all loading expense at Bombay, India, in case shipment was by charter vessel, had to be borne by Petitioner: but he admitted on cross-examination that this loading expense would be borne by Respondent (s.m.p. 715, 716, 717).

642 W. N. Chadha, another witness called as an expert by Respondent, testified that discharge means the unloading of the material from the ship at the port of destination and in the case of liner vessel this includes unloading by tackle to lighters (s.m.p. 545).

The contract stated the price as $35.25 per dry long ton, C.I.F., Mobile, with freight basis at $11.50 maximum, liner vessel, increase if any to

buyer's account. The contract also provided that the buyer was to pay the freight. In case of liner vessel the seller was to obtain "Freight to collect" Bills of Lading. In case of charter vessel the buyer was to pay the freight in New York in U. S. dollars immediately upon completion of loading. The price stated in the contract was the mathematical basis on which the price was to be computed. This price would apply whether the goods were shipped in a liner or in a charter vessel. In any event the buyer, Petitioner, would have to pay the freight. Liner terms include unloading charges; whereas on a charter vessel the 644
rate ordinarily would be exclusive of unloading and there would be additional charges for the same. However, under the terms of this contract, if a vessel were chartered, the freight allowance was to be computed on liner terms, as if the goods had been shipped on a liner vessel, and this includes the cost of unloading—i.e., discharge. The price as stated—$35.25 per dry long ton, C.I.F., Mobile, with freight basis at $11.50 maximum, liner vessel, increase if any to buyer's account—means that, whether the goods were shipped by liner or charter vessel, the buyer would be entitled to a credit of only the amount paid, including the cost of unloading, up to a maximum 645
of $11.50. All freight charges in excess thereof would have to be borne by the buyer. If, on the other hand, the freight including the cost of unloading was less than $11.50, the seller was to get the benefit of the saving.

Therefore, the insertion of the word "discharged" in the letter of credit, which did not appear in the contract, has no significance and

no materiality, since it did not change the meaning and did not impose any additional financial obligation or responsibility on the seller.

The letter of credit also stated the unit price as $36.00 per ton C.I.F., less freight approximately $11.50 per ton. This was in accord with the letters of the parties written December 10, 13, 14 and 22, wherein Respondent had agreed to invoice at $36.00 per ton.

The use of the word "approximately" was also in accord with the contract and the intent of the
647 parties, because the amount of $11.50 per ton was the maximum freight allowance permitted to the buyer and the allowance was to be less if the seller booked the freight at a lower price.

2. I find that there was a discrepancy between the letter of credit and the contract concerning the matter of shipment in one shipload, but that it was immaterial and would have been amended had Respondent so requested. The contract gave Respondent the privilege to ship at any time through March, 1955, whereas the letter of credit required that shipment in one load be made not later than February 28, 1955.

I find that this discrepancy was a result of a
648 mistake on the part of the Petitioner. However, it is clear from the custom and usage between the parties that similar discrepancies were always corrected by Petitioner-Buyer at the request of Respondent-Seller. The evidence establishes that on many prior occasions Petitioner had corrected letters of credit changing the shipment date to conform to the contract and also even amending the contract itself to extend the shipment date.

I also find that it was established by the testimony that it was the general custom and usage in international trade and in the Indian ore trade to amend such a mistake in the shipment date at the request of the seller and that such a discrepancy was not considered substantial or material and was not considered as a justifiable basis for cancellation of a contract.

3. I find that there was no variance between the letter of credit and the contract with regard to the amount of the letter of credit, but that the amount for which the letter of credit was opened was in accord with the intent of the parties and 650
was specifically consented to by Respondent.

It is true that the contract provided that the letter of credit be opened for 110% of the C.I.F. value of the goods, which would have totaled $310,200.00. However, the contract also provided that the buyer should pay the freight. It is clear that it was not the intent of the parties that the buyer should open a letter of credit for an amount including freight at $11.50 per ton and also pay the freight. Thus, in its letters of December 14, 1954 and December 22, 1954 Respondent specifically agreed to the opening of credit on the F.O.B. (plus insurance) value of the goods (i.e., the C.I.F. price less freight of $11.50)—and Respondent 651
never made any objection to the total amount of the letter of credit being $209,000.00.

4. I find that the letter of credit was opened definitely before December 20, 1954, in accordance with the terms of the contract.

The Respondent claims that Petitioner failed to open the letter of credit before December 20,

1954 as required by the contract, and bases this contention on the fact that the letter of credit itself was not received by Respondent until January 6, 1955. However, the contract did not set any date for receipt of the letter of credit but merely required that it be "opened" before December 20. The letter of credit was "opened" before December 20, 1954, as conclusively established by the evidence, and Respondent was notified thereof by the Bank of Tokyo, Ltd. on December 18, 1954.

653 The opening of the letter of credit must be differentiated from the issuance of the letter of credit to the beneficiary (Bril vs. Suomen Pankki Finland's Bank, 199 Misc. 11, 22; Courteen Seed Co. vs. Hong Kong & Shanghai Banking Corp., 216 App. Div. 495, aff'd 245 N. Y. 377).

5. I find that the discrepancy, if any, between the letter of credit and the contract, concerning the expiration date of the letter of credit, is immaterial.

654 The letter of credit provided that it was valid only until April 7, 1955, whereas the contract provided that the letter of credit should be valid until the determination of the out-turn sampling, weighment and analysis of the goods and final settlement of account. The evidence established that in issuing letters of credit banks require a definite expiration date, and, accordingly, this expiration date of April 7 was stated in the letter of credit.

Had Respondent requested an amendment of the letter of credit to extend the expiration date, that amendment would have been granted in

accordance with the prior course of conduct between the parties. On numerous prior occasions Respondent had requested extensions of the expiration dates of the letters of credit. These requests had invariably been granted by Petitioner and the expiration dates extended.

The variance here complained of by Respondent consists only of the fact that a definite date of expiration was set forth in the letter of credit, as required by the bank, whereas the contract did not set forth a definite date. There was a variation in terminology only, and no discrepancy in substance. The letter of credit could have been 656
negotiated by the seller prior to April 7, 1955, and, in any event, the seller could have obtained an extension of the expiration date had it requested it.

6. I find that the variation between the letter of credit (providing for payment on a 90 day sight draft) from the contract (which provided for payment on sight draft) was immaterial.

The evidence established that it made no difference at all to Respondent whether the drafts were sight or 60 or 90 days because Petitioner would pay and had agreed to pay the exchange difference and the stamp duty involved. By its 657
letter of December 14, 1954 Respondent had consented to the letter of credit calling for a 60 day draft instead of a sight draft. Had Respondent requested that the letter of credit be amended so as to change the 90 day draft to a 60 day draft or even to a sight draft, the request would have been granted and the amendment effected, as was

the prior custom between the parties and the general custom in the trade.

7. I find that the variance between the letter of credit and the contract concerning the matter of insurance was immaterial. The contract provided for insurance coverage up to 110% of the invoice value, claims to be payable in dollars in New York; whereas the letter of credit required that the insurance was to be covered by a first class U. S. or British insurance company.

This is but another minor variance which does
659 not furnish any justifiable basis for cancellation of the contract. Had Respondent requested it, the letter of credit would have been amended to eliminate the requirement that the insurance be placed with a first class U. S. or British insurance company.

The actual discrepancies between the letter of credit and the contract are immaterial. The evidence established that the custom and usage of international trade and of the Indian ore trade was for the beneficiary of a letter of credit to request amendments to conform the letter of credit to the contract and that the effecting of such amendments was usual and customary. The evi-
660 dence also established that the course of conduct of the parties was in accord with this custom and that in many prior transactions between them Petitioner had effected amendments in the letters of credit to conform to the contracts at the request of Respondent.

The only claimed variance herein which Respondent requested Petitioner to amend and which

Petitioner refused was the stating of the unit price as C.I.F. Mobile discharged instead of C.I.F. Mobile; but, as heretofore shown, that variance was merely a change in wording, not in substance, and was, therefore, not a variance at all.

I conclude, therefore, that Petitioner substantially performed the terms and conditions of the contract on its part; that Respondent breached the contract and that Petitioner is entitled to the damages sustained by it.

The general rule is that the measure of damages is the difference between the contract price and the market value at the time and place that the goods should have been delivered (Czarnikow-Rionda Co. vs. Federal Sugar Refining Co., 255 N. Y. 133; Segall vs. Finlay, 245 N. Y. 61; John Dimon Corp. vs. Federal Sugar Refining Co., 215 App. Div. 140, 213 N. Y. S. 106). 662

Under the contract delivery was to be made at Bombay, India, no later than March 31, 1955. I find that the market value of the goods in Bombay in March, 1955 was $6.50 more than the contract price. Under the contract, calling for 8,000 tons, 10% more or less, the seller was bound to deliver 90% of 8,000 tons, i.e., 7200 tons. Therefore, Petitioner's damage was 7200 times $6.50, totaling $46,800.00. Since delivery was to be made by shipment no later than March 31, 1955, interest should run from that date. 663

Petitioner claims, however, that it is not limited to general damages, but is entitled to special damages.

Immediately preceding the execution on December 8, 1954 of the contract between Petitioner and

Respondent, Iida & Co., Ltd. of Bombay, India (of which petitioner was a subsidiary) had entered into a contract with M. H. Hardy & Co. Inc. (which contract was assigned on December 8, 1954 to petitioner), whereby Hardy & Co. agreed to purchase from Petitioner's assignor 8,000 gross tons, 5% more or less, seller's option, of Indian manganese ore, at $36.00 per dry gross ton, C.I.F. Mobile, Alabama, discharge included. [Hardy & Co., in turn, contracted to sell the ore to U. S. Steel.]

665 At the time Petitioner and Respondent entered into their contract, Respondent had been apprised of the contract between Petitioner and Hardy & Co. and knew Petitioner had agreed to sell the ore to Hardy & Co.

After Respondent cancelled its contract with Petitioner, Petitioner advised Hardy & Co. that it was unable to make delivery of the manganese ore under Petitioner's contract with Hardy & Co. On February 17, 1955 Petitioner and Hardy & Co. entered into an agreement whereby Petitioner agreed to pay Hardy & Co. $64,600.00 to make up the difference between the price of $36.00 per ton at which Petitioner had agreed to deliver the ore and the price of $44.50 per ton at which Hardy &
666 Co. was to replace the ore in the market. The difference was $8.50 per ton. The contract between Petitioner and Hardy & Co. required the delivery of at least 95% of 8,000 tons, i.e., 7,600 tons. 7,600 times $8.50 equals $64,600.00. $30,000.00 of this amount was paid by Petitioner to Hardy & Co. by check dated February 17, 1955. The balance of $34,600.00 was made payable by a letter of credit issued by the Bank of Tokyo, Ltd. to Hardy & Co.,

with 50% payable September 30, 1955 and 50% payable December 31, 1955 against Hardy & Co.'s receipt for the payment in accordance with the agreement of February 17, 1955 between Hardy & Co. and Petitioner. (Incidentally, it should be noted that Petitioner promptly made a settlement with Hardy & Co., without putting the latter to any trouble of instituting arbitration proceedings or litigation, and Petitioner thus demonstrated a very high standard of business ethics).

Where there are special circumstances made known to the seller at the making of the contract from which it might reasonably have been foreseen 668
that a non-delivery by the seller would in turn cause a breach of the buyer's contract with a customer and the two contracts are in fact breached, the damages paid and expenses incurred by the buyer in satisfying the customer may be taken as the measure of damages which the original seller must pay to the original buyer. However, liability for the special loss incurred by the original buyer may be visited upon the original seller only if the latter knew that other goods of the kind contracted for could not be obtained by the original buyer (Czarnikow-Rionda vs. Federal Sugar R. Co., 255 N. Y. 33, 41).

The proof herein fails to show that Respondent 669
had knowledge at the time it contracted with Petitioner that other goods of the kind contracted for could not be obtained by Petitioner. Furthermore, the proof fails to show that the petitioner could not have purchased 7,200 or 8,000 tons of Indian manganese ore in the general market in order to replace the ore which Respondent had failed to deliver. If any circumstances prevented Peti-

tioner from making replacement, they were circumstances which Respondent, when contracting, could not have foreseen.

I find from the preponderance of the evidence that there was a general market for Indian manganese ore in January, February and March, 1955 and that by resorting to this market Petitioner could have replaced the undelivered goods and satisfied Hardy & Co.

I find also from the evidence that had Petitioner obtained a firm committment for such ore in February, 1955, as it could have done, Hardy & Co.
671 would have granted Petitioner an extension of time for shipment, just as Hardy & Co.'s purchaser, U. S. Steel, granted to Hardy & Co.

Under the circumstances Petitioner cannot recover special damages, but is limited to general damages.

Nevertheless, if Petitioner's damages were computed on the basis of special damages, the damages would not exceed $46,800.00, but would be in exactly the same amount.

Petitioner's contract with Hardy & Co. was for 8,000 tons, 5% more or less, requiring delivery of 7,600 tons. Petitioner's contract with Respondent
672 was for 8,000 tons, 10% more or less, requiring Respondent to deliver only 7,200 tons. Therefore, there must be deducted from Petitioner's special damage $8.50 per ton for 400 tons amounting to $3,400.00.

Petitioner's contract with Hardy & Co. specified that the maximum phosphorus content was 0.15%, whereas Petitioner's contract with Respondent

specified a maximum phosphorus content of 0.18%. The evidence establishes that manganese ore with a phosphorus content of 0.15% was worth at least $1.00 per ton more than ore with a 0.18% phosphorus content. Therefore, there must be deducted from Petitioner's special damages 7,200 times $1.00 or $7,200.00.

Furthermore, the price of $44.50 per ton, C.I.F., on the basis of which Petitioner and Hardy & Co. settled, included a freight charge which was at least $1.00 higher per ton than the freight allowance to Petitioner of $11.50 maximum in its contract with Respondent. The evidence establishes 674
that the freight rates in February and March, 1955, either on liner vessel or on charter vessel, liner terms, was at least $12.50. [Even if Respondent had performed its contract Petitioner would have had to pay such excess freight, because under the terms of its contract any excess over $11.50, by liner vessel or by charter vessel, liner terms, had to be borne by the buyer]. Therefore, there must be deducted from Petitioner's special damages 7,200 times $1.00, amounting to $7,200.00. These deductions of $3,400.00, $7,200.00 and $7,200.00 total $17,800.00 which deducted from $64,600.00 leaves $46,800.00.

I conclude also that Petitioner is entitled to re- 675
cover the travel expenses for the round trip from Bombay to New York of Petitioner's material witness Hiroshi Munakata, Petitioner's Bombay representative. This round trip fare was $1152.07. I find also that the reasonable value of the maintenance expense of Mr. Munakata in New York was $10.00 per day and that Petitioner is entitled to

this sum for the 90 days Mr. Munakata necessarily had to be in New York, totaling $900.00.

I conclude also that Petitioner is not entitled to recover any of the other items of special damage claimed by it.

Petitioner will therefore be awarded the sums of $46,800.00 plus $1152.07 plus $900.00, totaling $48,852.07, with interest on the sum of $46,800.00 from March 31, 1955, and the costs and disbursements stipulated by the parties, and such other costs and disbursements as may be properly taxed under the provisions of the Civil Practice Act.

677

WILLIAM A. HYMAN,
Arbitrator.

Opinion of Mr. Justice Thomas A. Aurelio on Petitioner's Motion to Confirm Award of Arbitrator and Respondent's Cross Motion to Modify Said Award and for Other Relief (N. Y. Law Journal, October 25, 1955).

In re Iida & Co., N. Y., Inc. (*Devidayal Sales, Ltd.*)—Motion to confirm award of arbitrator and for judgment as prayed for is granted. The cross-motion to deny or to modify the award is denied. The award of an arbitrator cannot be set aside for mere error of judgment as to the law or facts of the case submitted to him. Settle order.

678

Stipulation as to Abridged Record. 679

SUPREME COURT

OF THE STATE OF NEW YORK,

APPELLATE DIVISION—FIRST DEPARTMENT.

In the Matter of the Arbitration of certain differences between

IDA & CO. NEW YORK, INC.,
Petitioner-Respondent,

and

DEVIDAYAL (SALES) LTD.,
Respondent-Appellant. 680

IT IS STIPULATED, subject to the approval of this Court, that the Record on Appeal in the above entitled proceeding to be filed in this Court be abridged so as to include only such portions of the transcript of the hearing before the Arbitrator as set forth in the proposed record as printed, which has been agreed upon between the attorneys for the respective parties and so as to dispense with the remaining portions of the transcript of the hearing before the Arbitrator.

Dated: New York, April 11th, 1956.

681

BUCHTER, RATHHEIM,
ABRAMS & HOFFMAN,
Attorneys for Petitioner-Respondent.

LEHMAN, GOLDMARK & ROHRLICH,
Attorneys for Respondent-Appellant.

SO ORDERED, on condition that either party may submit the entire transcript, if it is so advised on the argument.

/sgd./ CHARLES D. BREITEL.
4-11-56.

682

Affidavit of No Other Opinion.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

JEROME L. ABRAMS, being duly sworn, deposes and says:

That he is an attorney and a member of the firm of Lehman, Goldmark & Rohrlich, Esqs., the attorneys for the Respondent-Appellant herein, and is familiar with all the proceedings herein.

No other opinion was rendered by the Court below in making the order and judgment appealed
683 from except as appears at page 226 herein.

JEROME L. ABRAMS

Sworn to before me this
19 day of April, 1956.

MAX REGOV
Notary Public, State of New York
No. 03-3233500
Qualified in Bronx County
Certs filed with N. Y. Co. Clerk
Commission expires March 30, 1957

684

685

Stipulation Waiving Certification.

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing consists of true and correct copies of the notice of appeal, the resettled order and judgment appealed from, and such portions of all the papers upon which the Court below acted in making said order and judgment appealed from, as agreed upon by the parties as the abridged record herein, now on file in the office of the Clerk of the County of New York; and certification thereof by said Clerk, pursuant to Section 616 of the Civil Practice Act, is hereby waived.

686

Dated, New York, April 19, 1956.

LEHMAN, GOLDMARK & ROHRLICH,
Attorneys for Respondent-Appellant.

BUCHTER, RATHHEIM, ABRAMS & HOFFMAN,
Attorneys for Petitioner-Respondent.

687

ADDITIONAL PAPERS
TO THE
COURT OF APPEALS

691

Notice of Appeal to Court of Appeals

SUPREME COURT

NEW YORK COUNTY

In the Matter of the Arbitration of certain differences between

IDA & CO. NEW YORK, INC., Petitioner-Respondent,

and

DEVIDAYAL (SALES) LTD., Respondent-Appellant.

692

Sirs:

PLEASE TAKE NOTICE that, pursuant to leave granted by an order of the Appellate Division, Supreme Court, First Judicial Department, in the above entitled action, dated the 11th day of December, 1956, and entered on the 21st day of December, 1956 in the office of the Clerk of said Appellate Division, Devidayal (Sales) Ltd., the respondent-appellant above named, hereby appeals to the Court of Appeals of the State of New York from the order of affirmance of the Appellate Division, First Department, entered in the office of the Clerk of the Appellate Division, First De- 693 partment on the 9th day of October, 1956, and the judgment of affirmance entered herein in the office of the Clerk of the County of New York, on the 16th day of October, 1956, pursuant to said order of affirmance, which judgment unanimously affirmed with $155.79 costs a final judgment of the Supreme Court, New York County, entered the 2nd day of November, 1955, in the office of the

694 *Notice of Appeal to Court of Appeals*

Clerk of the County of New York, in favor of the above-named Petitioner-Respondent and against the above-named Respondent-Appellant, in the sum of $54,838.46, and the Respondent-Appellant appeals from each and every part of the said order and the said judgment and from the whole thereof.

Dated, New York, January 10, 1957.

Yours, etc.,

ARNOLD D. NAIDICH,
Attorney for Respondent-
695 Appellant,
Office & P. O. Address,
130 West 42nd Street,
New York 36, New York.

To:

BUCHTER, RATHHEIM, ABRAMS
& HOFFMAN, Esqs.,
Attorneys for Petitioner-Respondent,
Office & P. O. Address,
61 Broadway,
New York 6, New York.

ARCHIBALD R. WATSON, Esq.,
Clerk of the County of New York.
696

Order Granting Leave to Appeal

At a term of the Appellate Division of the Supreme Court of the State of New York, held in and for the First Judicial Department in the County of New York, on the 11th day of December, 1956.

Present:

HON. DAVID W. PECK,
Presiding Justice,
HON. BERNARD BOTEIN,
HON. BENJAMIN J. RABIN,
HON. JOSEPH A. COX,
HON. FRANCIS L. VALENTE,
Justices.

In the Matter of the Arbitration of certain differences between

IDA & CO. NEW YORK, INC.,
Petitioner-Respondent,

and

DEVIDAYAL (SALES) LTD.,
Respondent-Appellant.

The above named respondent-appellant in this action, having moved for leave to appeal to the Court of Appeals from the judgment of Affirmance, entered in the office of the Clerk of New York County on the 16th day of October, 1956, and the order of said Appellate Division, First Department, on which judgment was entered, entered in the office of the clerk of said Appellate Division, First Department, on October 9th, 1956, and which judgment unanimously affirmed the order of the Supreme Court, New York County, entered the 28th day of October, 1955, as resettled by an order of said Court entered the 29th day of November, 1955, and the judgment of the Supreme Court, New York County, entered

in the office of the Clerk of New York County on the 2nd day of November, 1955, and the motion having duly and regularly come on to be heard,

Now, on reading and filing the notice of motion, dated November 20th, 1956, with proof of due service thereof, and the affidavit of Arnold D. Naidich, verified the 20th day of November, 1956, in support of said motion, and the affidavit of Harold M. Hoffman, verified the 23rd day of November, 1956, in opposition thereto, and upon the order of the Supreme Court, New York County, entered the 28th day of October, 1955, as resettled by an order of said Court entered on the
701 29th day of November, 1955, the judgment of the Supreme Court, New York County, entered in the office of the Clerk of the County of New York, on the 2nd day of November, 1955, the order of the Appellate Division, First Department, affirming said order and judgment, entered in the office of the clerk of the Appellate Division, First Department, on the 9th day of October, 1956, the judgment of affirmance entered on the 16th day of October, 1956, in the office of the Clerk of the County of New York upon said order of affirmance, the printed record on appeal to said Appellate Division, and upon the briefs filed therein, and upon all the papers, pleadings and proceedings
702 herein, and it appearing to the Court that questions of law are involved which ought to be reviewed by the Court of Appeals, it is hereby

ORDERED that the said motion for leave to appeal to the Court of Appeals be and the same hereby is granted and this Court hereby certifies that in its opinion questions of law are involved which ought to be reviewed by the Court of Appeals.

Enter,

D. W. P.

703

Order of Affirmance

At a term of the Appellate Division of the Supreme Court held in and for First Judicial Department in the County of New York, on the 9th day of October, 1956.

Present:

HON. DAVID W. PECK;
Presiding Justice,
" BERNARD BOTEIN,
" BENJAMIN J. RABIN,
" JOSEPH A. COX,
" FRANCIS L. VALENTE,
Justices.

704

10328-10329

In the Matter of the Arbitration of certain differences between

IDA & CO. NEW YORK, INC.,
Petitioner-Respondent,

and

DEVIDAYAL (SALES) LTD.,
Respondent-Appellant.

An appeal having been taken to this court by the respondent-appellant from an order of the Supreme Court, New York County, entered on or about the 28th day of October, 1955, as resettled by an order of said court entered on the 29th day of November, 1955 granting petitioner's motion to confirm the award of the arbitrator herein and denying respondent's cross-motion to deny or modify said award, and from the judgment of said court entered on the 2nd day of November, 1955,

705

706 *Judgment of Affirmance*

And said appeals having been argued by Mr. Chester Rohrlich of counsel for the appellant, and by Mr. Harold M. Hoffman of counsel for the petitioner-respondent; and due deliberation having been had thereon,

It is hereby unanimously ordered and adjudged that the judgment and order so appealed from be and the same are hereby, in all things, affirmed; and that the respondent recover of the appellant the costs of this appeal.

Enter,

707 GEORGE T. CAMPBELL,
Clerk.

Judgment of Affirmance

SUPREME COURT

NEW YORK COUNTY

In the Matter of the Arbitration of certain differences between

IDA & CO. NEW YORK, INC.,
Petitioner,

708 and

DEVIDAYAL (SALES) LTD.,
Respondent.

The respondent above named having appealed to the Appellate Division, First Department, from an order of this Court entered on or about October 28, 1955 as resettled by order of this Court entered on November 29, 1955 granting petitioner's mo-

tion to confirm the award of the arbitrator herein and denying respondent's cross-motion to deny or modify said award, and from the judgment entered in this action on November 2, 1955 in the Office of the Clerk of New York County, and the appeal having been heard at a Term of said Appellate Division, First Department, on the 20th day of September, 1956, and an order of said Appellate Division having been made and entered on October 9, 1956 affirming said judgment and order with costs of said appeal to petitioner, all the justices concurring,

710 Now, on motion of Buchter, Rathheim, Abrams & Hoffman, attorneys for the petitioner, it is hereby

ADJUDGED that the said judgment and order so appealed from be and the same hereby are affirmed in all things, and it is further

ADJUDGED, that Iida & Co., New York, Inc., the petitioner herein, with an office at 39 Broadway, New York 6, New York, recover of Devidayal (Sales) Ltd., the respondent herein, with an office at Reay Road, Mazagaon, Darukhana, Bombay 10, India, the sum of $155.79 costs and disbursements of said appeal, and that petitioner have execution 711 therefor.

Dated: New York,
October 16, 1956.

ARCHIBALD R. WATSON,
Clerk.

Entered: Oct. 16, 1956, 12:30 P.M.
Co. Clk. N. Y.

712

Affidavit of No Other Opinion

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

ARNOLD D. NAIDICH, being duly sworn, deposes and says:

That he is the attorney for the Respondent-Appellant herein, and is familiar with all the proceedings herein.

No other opinion was rendered by the Court below in making the order and judgment appealed from except as appears at page 235-237 herein.

713

ARNOLD D. NAIDICH.

Sworn to before me this
day of January, 1957.

MAX REGOV
Notary Public, State of New York
No. 03-323350
Qualified in Bronx County
Certs. filed with N. Y. Co. Clerk
Commission expires March 30, 1957

714

715

Stipulation Waiving Certification

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing consists of true and correct copies of the notice of appeal, the order and judgment appealed from, and the record upon which the Appellate Division below acted in making said order and judgment appealed from, now on file in the office of the Clerk of the County of New York; and certification thereof by said Clerk, pursuant to Section 616 of the Civil Practice Act, is hereby waived.

Dated: New York, January , 1957.

716

ARNOLD D. NAIDICH,
Attorney for Respondent-Appellant.

BUCHTER, RATHHEIM, ABRAMS
& HOFFMAN,
Attorneys for Petitioner-Respondent.

717

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FILED
OCT 19 1957
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 563

IN THE MATTER

of

The Arbitration of Certain Differences between
DEVIDAYAL (SALES) LTD.,

Petitioner,

and

IIDA & CO., NEW YORK, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK, AND APPENDIX.

PETER BELSITO,
Attorney for Petitioner,
285 Madison Avenue,
New York 17, N. Y.

PETER BELSITO,
ARNOLD D. NAIDICH,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1957

No. .....

IN THE MATTER

of

The Arbitration of Certain Differences between DEVIDAYAL (SALES) LTD.,

Petitioner,

and

IIDA & CO., NEW YORK, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Devidayal (Sales) Ltd. respectfully prays for a Writ of Certiorari to the Court of Appeals of the State of New York to review the Order of the said court remitted to the County Clerk of New York County and the judgment therein filed and docketed in the said County Clerk's Office of New York County, on the 22nd day of July, 1957, which affirmed the order of the Appellate Division of the Supreme Court of the State of New York in and for the First Judicial Department, entered in the Office of the Clerk of the Appellate Division, First Department, on the 9th day of October, 1956, which said judgment

unanimously affirmed the judgment of the Supreme Court, New York County, entered the 2nd day of November, 1955 in the Office of the Clerk of the County of New York in favor of the above named respondent, Iida & Co., New York, Inc.

Permission for leave to appeal to the Court of Appeals was granted by the Appellate Division of the First Department on December 11th, 1956, which certified "that in its opinion questions of law are involved which ought to be reviewed by the Court of Appeals."

The affirmance by the Court of Appeals of the State of New York contained no opinion.

Opinions Below.

Special Term summarily confirmed the award of the Arbitrator and denied the cross-motion to deny or modify the award, stating (fol. 678 of the Record):

> "The award of an arbitrator cannot be set aside for mere error of judgment as to the law or facts of the case submitted to him."

This summary confirmation was made in the face of the Arbitrator's statement in the award that he was rendering a legal opinion "as would a Justice of the Court trying the case without a jury" (fol. 599), in order that the award may be set aside or modified "if there is any palpable error of fact or law" (fol. 599).

The Appellate Division affirmed without opinion (fols. 703-711).

The Court of Appeals affirmed without opinion and the judgment docketed therein appears in the Appendix.

The decision of the arbitrator, William A. Hyman, Esq., appears in folios 574-677 and contains the statement of facts.

Jurisdiction.

The decision of the Court of Appeals of the State of New York sought to be reviewed, operates (1) to deny the petitioners the equal protection of the laws, and (2) to deprive them of their property without due process of the law.

The said decision of the Court of Appeals affirmed the order of the Appellate Division, and the judgment entered thereon was filed and docketed on the 22nd day of July, 1957 in the Office of the Clerk of the County of New York (Appendix).

There has been no order respecting a re-hearing and there has been no extension of time within which to petition for Certiorari.

The jurisdiction of this Court is invoked under 28 U. S. C. A., section 1257, subd. 3, as amended by the Act of June 25, 1948, C. 646, Stat. 929.

Questions Presented for Review.

Does the decision of the New York Court of Appeals operate to deny to the petitioners the constitutional guarantees of the 14th Amendment?

Is the applicable law which should be applied to the facts in this case the law in force in India, the situs of the execution of the contract whose breach is alleged?

Can the improper application of the law of New York by the Arbitrator be held to be conclusive where the Arbitrator intended to decide in accordance with law but did not do so?

Are damages fixed and definitely settled immediately upon an absolute breach of the contract when the seller refused to deliver?

Constitutional Provisions and Statutes Involved.

United States Constitution, Amendment 14, Section 1:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York State Constitution, Article 1, Section 11:

> "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. • • •."

Section 148 New York Personal Property Law:

> "Action for failing to deliver goods—
>
> 1. Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for nondelivery.
>
> 2. The measure of damages is the loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract.
>
> 3. Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver."

Section 1462 . . . New York Civil Practice Act:

> ". . . the Court must make an order vacating the award . . . (4) Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject-matter submitted was not made."

Section 39 Indian Contract Law:

> "When a party to a contract has refused to perform . . . the promisee may put an end to the contract, unless he has signified . . . his acquiescence in its continuance."

Statement of the Case.

The parties entered into a written contract on December 8, 1954, for the sale by Petitioner to Respondent of 8,000 long tons, 10% more or less at seller's option, of Indian Manganese Ore. • • • Shipment was to be made during January/March 1955, in minimum monthly quantities of 2500 tons or alternatively as one shipload, at seller's option, in liner or charter vessel at seller's option (fols. 603-604, 438-442).

The Arbitrator stated that his opinion was a part of the award to which it was attached (fol. 584). He expressly found that buyer had substantially performed the terms and conditions of the contract (fol. 661); that there were at least four and possibly five discrepancies and variations between the letter of credit of the buyer and the contract between the parties (fols. 637-646, 647, 653-655, 656, 658); that such discrepancies and variations were immaterial (fol. 659) and, accordingly, that seller breached the contract (fol. 661) and, that buyer was entitled to general damages, under the contract, at the "time and place that the goods should have been delivered" (fols. 661-662).

He also specifically found that the seller had formally cancelled its contract on January 6, 1955 (fol. 624); that there was a general market for the ore in January and February, 1955 (fol. 670); that by resorting to this market, the buyer could have replaced the undelivered goods • • •

(fol. 670); and that the market price in March was $6.50 a ton higher than the contract price (fol. 662).

The buyer accepted the seller's breach of contract in January. On January 8, the buyer notified the seller that it would give them 24 hours to withdraw its cancellation or "we shall take it * * * that you have committed breach thereof * * *" (fols. 460-462). On January 18, the buyer's representative, Munakata, "went to Devidayal and tried to persuade them to accept a $1.00 increase" (fol. 107). On February 7, the buyer instructed M. W. Hardy & Co., Inc. to purchase the full 8000 tons of Indian Manganese Ore, subject to its approval of the final price (fols. 551-554). On February 14, the buyer applied to the Court for the appointment of an arbitrator (fol. 550). On February 17, the buyer committed itself to a price with M. W. Hardy & Co., Inc. (fols. 490-498).

There was a very substantial rise in the market price of the ore from January 6 (the date of the seller's repudiation) to the end of March (the date utilized by the Arbitrator for determining the buyer's damages). This fact stands uncontradicted and incontrovertible. Not one witness for either side testified otherwise.

By February and March, a witness for the buyer testified "the market had run away with itself" (fol. 414), and another witness for the buyer testified the real shortage and scarcity of the ore came about in March (fols. 139-140). It was in March that an acute shortage sent the market price sky-high. Had the Arbitrator determined the buyer's damages in early January rather than at the end of March, the award would have been at least $23,400 to $32,400 less than it actually was.

The Arbitrator, however, erroneously determined damages as of the end of March, even though he expressly stated and intended to apply the correct principle of law in the said determination (fols. 662-663, 599).

The Manner in Which the Federal Question Sought to be Reviewed was Raised.

The federal question arose when the Court of Appeals denied the petitioner the equal protection of the law. This denial gave the petitioners their first opportunity to raise the federal question now sought to be reviewed.*

ARGUMENT.

The decision of the New York Court of Appeals operates to deny to petitioners the constitutional guaranties of the Fourteenth Amendment.

A. This Court has repeatedly held that judicial acts of state Courts are subject to the prescriptions of the Fourteenth Amendment. In *Shelley* v. *Kraemer*, 334 U. S. 1, 14, 68 S. Ct. 836, 842, Mr. Chief Justice Vinson, writing for the Court, stated:

"In the Civil Rights cases, 1883, 109 U. S. 3, 11, 17, 3 S. Ct. 18, 21, 27 L. Ed. 835, this Court pointed out that the Amendment makes void 'state action of every kind' which is inconsistent with the guaranties therein contained, and extends to manifestations or 'state authority, in the shape of laws, customs, or judicial or executive proceedings.' "

Whether a specific act violates the constitutional guaranties is to be determined not only by its provisions but, also, by its operation and application. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 S. Ct. 1064. It is also the province of this Court to review a decision of a state court of last resort,

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* In *Saunders* v. *Shaw, et al.*, 244 U. S. 317, this Court (per Holmes, J.) held: "But when the act complained of . . . when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy of infraction for constitutional rights if the party aggrieved in such a way, could not come here. . . ."

where the operation of such decision deprives a litigant of rights guaranteed by the Constitution. *Shelley* v. *Kraemer, supra; Saunders* v. *Shaw, supra.*

B. The law applicable to the determination of the breach of contract is the law of the situs of the execution of the contract whose breach is alleged. The place of execution determines the applicable law. The validity of a breach must be determined by the *lex loci contractus.* The law of the place of the contract acts upon it, independently of any volition of the parties, in virtue of the general sovereignty possessed by every nation to regulate all persons and property and transactions within its own territory.

The contract having been made and executed in India, the law applicable to the breach thereof was Indian law. Moreover, the performance was to be completed in India. The test of a breach must therefore be determined by the law of the situs.

C. The petitioner sought to have the Court below vacate the Arbitrator's award for the reasons that (1) the Arbitrator, although he intended to decide in accordance with law, did not do so and (2) that the Arbitrator expressly intended and invited a review on the basis of the applicable law and the Courts below, did not review on that basis. The intentions of the Arbitrator were expressly stated on the face of the award and therefore the award lacked finality.

The Court has the power and the duty to review and set aside an arbitrator's award for an error in law in those instances where the question of law is stated on the face of the award and where it is clear on the face of the award that the Arbitrator intended to decide in accordance with the law but did not do so.

In *Application of Davis,* 57 N. Y. S. 2d 387, 389, Sp. T., N. Y. Co. (1945), the Court stated:

> "An award must be vacated * * * if the award is mistaken in the application of a rule of law which the award, on its face, has adopted."

The rationale in such cases is simple and meritorious. If it is clear that the Arbitrator intended to decide the matter on the basis of the applicable law, and erred in his decision as matter of law, then "the award is not what the arbitrators themselves intended" (*Fudickar* v. *Guardian Mutual Life*, 62 N. Y. 400).

In the instant case it is not necessary to speculate as to the Arbitrator's "presumed" intent. He expressly stated that he intended the Court to review for error of law; he was not satisfied to state his bare decision in the award; but supplemented it by setting forth his reasons "in full" so that, in his words, "the award may be set aside or modified" if the Court should find "any palpable error of fact or law".

Accordingly, the Arbitrator's intent to "refer the point for the opinion of the Court" and the Court's power and duty to review on the basis of the applicable law to ascertain whether the award is "founded on mistake" is crystal clear.

Where the Arbitrator sets forth the reasons for the award in full for the express purpose of having the Court review for errors of fact and law, the Court is obliged to ascertain the law under Section 1462 (4) of the Civil Practice Act. If the Court does not do so, the award does not and cannot have the requisite finality intended by the Arbitrator or by the Legislature under Section 1462 (4).

In point of fact, the Arbitrator made a palpable and grievous error of law in his determination of the measure of damages. Where an arbitrator expressly intended to decide in accordance with correct principles of law, his

failure to do so, no less than a court's "failure to apply the proper legal measure of damages was a manifest error of law" (*Hutches* v. *Renfroe*, 200 F. 2d 337, 341, C. A. 5th, 1953).

D. The date of the seller's breach is determinative of the time for measuring the damages of the buyer.

The Courts in New York have consistently held under Section 148(3) of the New York Personal Property Law that the time of the breach is the pivotal fact for the determination of damages.

In *Emerman* v. *Cohen*, 199 F. 2d 857, 858 (C. A. 2nd, 1952), the Court stated, applying Par. 148 (3):

> "Since federal jurisdiction rests upon diversity, New York law must control as to the measure of damages. The New York Sales Act provides that if, at the time of breach, there is an available market in which the purchaser can obtain the goods, then his measure of damages shall generally be the difference between that market price and the contract price."

In the last analysis, it is sheer sophistry, under Section 148 (3), to contend that a conceded breach of contract on a certain date, accepted by the buyer, does not establish the time of the breach, even though the party in default had the absolute right to render full performance as of the said date.

The buyer's unequivocal acceptance of an anticipatory breach fixes the buyer's damages as of that time.

Even under principles of anticipatory breach as set forth in *Segall* v. *Finley*, 245 N. Y. 61, the case upon which the Arbitrator relied as an authority, the buyer's damages would accrue at the time the buyer elected "to accept the repudiation as final". Where the buyer chooses to "assent to the abandonment of the contract", certainly then "its

vitality was gone and cease to exist" (*Graves* v. *White, et al.*, 87 N. Y. 463, 466, 1882).

The original contract, accordingly, cannot be held to have survived where "the plaintiff gave notice of an election to treat it as abandoned" and "treating it as abandoned, proposed a new contract" (*Rubber Trading Co.* v. *Manhattan R. Mfg. Co.*, 221 N. Y. 120, 125, 1917).

Where the seller has committed a breach of a contract in which it has an alternative choice as to the time and manner of its performance, the buyer's damages are determined in accordance with the alternative that will result in the smallest recovery to the buyer.

Williston, Contract (Rev. Ed., 1937), Par. 1407, pp. 3920-1, posits the precise principle of law here applicable in respect to an alternative contract, stating:

> "Where • • •; no choice has been made, either expressly by the promisor or automatically by the terms of the contract or by law, the measure of damages for breach of such a contract is the value of the alternative least onerous to the defendant."

The law in New York is in accord with the general principle of law enunciated. In Clark, New York Law of Damages (1925), Vol. I, Par. 166, p. 283, the author states:

> "Where a contract is strictly one in the alternative, as where the promisor agrees to do either one thing or another, and he fails to do either • • • the courts have adopted the rule known as the least beneficial alternative and have limited the promisee's recovery to that which will work the least harm to the defendant; the law in effect elects for him to do that which will be most beneficial to him."

It has been repeatedly held that where a promisor has agreed to alternative performances, in case of breach with-

out an election, the damages are measured by the alternative that will result in the smallest recovery.

The principle that the buyer's damages be in accordance with the seller's alternative which results in the smallest recovery has had wide application and approval in many jurisdictions. (*W. J. Holliday & Co.* v. *Highland Iron & Steel Co.*, 43 Ind. App. 342, 87 N. E. 249 (1909); *Myers* v. *C. W. Toles & Co.*, 287 Mich. 340, 283 N. W. 603 (1939); *Zalis* v. *Walter*, 180 Md. 120, 23 Atl. (2d) 26 (1941); *Godwin* v. *Graham*, 360 Mo. 418, 228 S. W. (2d) 789 (1950); *Ach* v. *Herman A. Straus, Inc.*, 67 Ohio App. 452, 37 N. E. (2d) 99 (1941). Where a party "is bound to do one of two things and does neither, • • • the measure of damages is in general the loss arising by reason of the contractor having failed to do that which is least, not that which is most beneficial to the contractee" (15 American Jurisprudence, Damages, Par. 43, p. 444).

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the constitutional question presented may be settled and determined.

Wherefore, your petitioners respectfully pray for a writ of certiorari to be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of the State of New York, commanding said Court to certify and to send to this Court, on a date to be designated, a full and complete transcript of the record and of all proceedings by the Court of Appeals had in this case, to the end that this cause may be reviewed and determined by this Honorable Court; that the order of the Court of Appeals

may be reversed, and that petitioners be granted such other and further relief as may be just and proper.

DEVIDAYAL (SALES) LTD.,
Petitioner,

By PETER BELSITO,
Attorney for Petitioner.

PETER BELSITO,
ARNOLD D. NAIDICH,
of Counsel.

APPENDIX.

Judgment of Affirmance.

Supreme Court of the State of New York

COUNTY OF NEW YORK.

IN THE MATTER *of* The Arbitration of Certain Differences between IDA & Co., NEW YORK, INC., Petitioner, *and* DEVIDAYAL (SALES) LTD., Respondent.	Judgment 1959/1955

The above named respondent, DEVIDAYAL (SALES) LTD., having appealed to the Court of Appeals from the Order of Affirmance of the Appellate Division, First Department, entered in the office of the Clerk of the Appellate Division, First Department, on the 9th day of October, 1956, and from the Judgment of Affirmance, entered herein in the office of the Clerk of the County of New York on the 16th day of October, 1956, pursuant to said Order of Affirmance which judgment unanimously affirmed a final judgment of the Supreme Court, New York County, entered the 2nd day of November, 1955, in the office of the Clerk of the County of New York, in favor of the above named petitioner, IDA & Co., NEW YORK, INC., and the Court of Appeals having heard said appeal and ordered and adjudged that the judgment so appealed from be affirmed and judgment rendered for petitioner, IDA & Co., NEW YORK, INC. with

costs and the Remittitur from the Court of Appeals having been filed in the office of the Clerk of the County of New York and an order having been entered thereon making the judgment of the Court of Appeals the judgment of this Court, and directing the entry of a Judgment of Affirmance herein with costs of said appeal to be taxed against respondent DEVIDAYAL (SALES) LTD.,

Now, on motion of Buchter, Rathheim, Abrams & Hoffman, Esqs., attorneys for petitioner, IDA & Co., NEW YORK, INC., it is hereby

ADJUDGED, that the said judgment so appealed from, be and the same hereby is affirmed, and it is further

ADJUDGED, that IDA & Co., NEW YORK, INC. the petitioner herein, with offices at 39 Broadway, New York 6, New York, recover of DEVIDAYAL (SALES) LTD., the respondent herein, with offices at Reay Road, Mazagaon, Darukhana, Bombay 10, India, the sum of $202.79 costs and disbursements of said appeal as taxed herein and that petitioner have execution therefor.

Dated: New York, N. Y., July 22, 1957.

ARCHIBALD R. WATSON,
Clerk.

Filed and docketed

Co Clk N Y. July 22, 1957

11:40 A M

Remittitur of Affirmance.

No. 111

COURT OF APPEALS

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 3rd day of July in the year of our Lord one thousand nine hundred and fifty-seven, before the Judges of said Court.

Witness,

The Hon. ALBERT CONWAY,
Chief Judge, Presiding,
RAYMOND J. CANNON, Clerk

Remittitur July 3, 1957.

No. 111

IN THE MATTER
of
The Arbitration of Certain Differences between IIDA & Co., NEW YORK,
Respondent,
and
DEVIDAYAL (SALES) LTD.,
Appellant.

BE IT REMEMBERED, that on the 8th day of April in the year of our Lord one thousand nine hundred and fifty-seven, Devidayal (Sales) Ltd., the appellant in this cause, came here unto the Court of Appeals, by Arnold D.

Naidich, its attorney, and filed in the said Court a Notice of Appeal and return thereto from a judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Iida and Co., New York, Inc., the respondent in said cause, afterwards appeared in said Court of Appeals by Buchter, Rathheim, Abrams & Hoffman, its attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, the said Court of Appeals having heard this cause argued by Mr. Chester Rohrlich, of counsel for the appellant, and by Mr. Harold M. Hoffman, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered, that the records aforesaid and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, etc.

/s/ RAYMOND J. CANNON
Clerk of the Court of Appeals of the
State of New York.

Court of Appeals, Clerk's Office }
Albany, July 3, 1957. }

[SEAL]

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ RAYMOND J. CANNON
Clerk.

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JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1957

No. 563

In the Matter

of

The Arbitration of Certain Differences between

DEVIDAYAL (SALES) LTD.,

Petitioner,

and

IIDA & CO., NEW YORK, INC.,

Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

ALFRED RATHHFIM,
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New York 6, N. Y.

SIDNEY ABRAMS,
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of Counsel.

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Supreme Court of the United States

October Term, 1957

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In the Matter

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The Arbitration of Certain Differences between

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IIDA & CO., NEW YORK, INC.,

Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Questions Presented

The petition purports to present a Federal question under the Fourteenth Amendment but couples with this three questions under purely local New York law (p. 2) and quotes local statutes having no Federal bearing at all.

Jurisdiction

The petitioner sets forth the due process and equal protection provisions of the Fourteenth Amendment (p. 4) and contents itself with the bare assertion that the decision of the New York Court of Appeals "operates (1) to deny the petitioners the equal protection of the laws, and (2) to deprive them of their property without due process of the

law" (p. 3, sub. Jurisdiction). Nowhere in the petition is this developed or again referred to and the petitioner nowhere shows in what manner it was denied equal protection or deprived of property without due process or in what respect its constitutional rights were violated.

ARGUMENT

A. There Is No Federal Question Presented.

The bare assertion that a Federal question exists is not sufficient to invoke the jurisdiction of this Court. In *Hamblin* v. *Western Land Company*, 147 U. S. 531, the Court wrote (p. 532):

> "A real, and not a fictitious, Federal question is essential to the jurisdiction of this court over the judgments of state courts. Milligar v. Hartupee, 6 Wall. 258; New Orleans v. New Orleans Water Works Co., 142 U. S. 79, 87. In the latter case it was said that 'the bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay.'"

To the same effect:

> *New Orleans Water Works Co.* v. *Louisiana*, 185 U. S. 336, 344-346.

B. No Federal Question Was Presented Below.

The Court has no jurisdiction primarily because no Federal question is presented. Even if there were a Federal question, it is not available to petitioner because it was never raised below, either before the Arbitrator, the Special Term, the Appellate Division, or the Court of Appeals.

A Federal question could not have been raised in this case in any appellate court for the petitioner itself expressly limited its appeal "solely to the question of damages" (fol. 71). If petitioner's argument were sound, that the decision of the New York Court of Appeals in deciding against it *ipso facto* raised a Federal question, then every litigant unsuccessful in the state court could seek a review by this Court through the simple expedient of merely claiming violation of constitutional guaranties. Petitioner admits that no Federal question was raised below (p. 7) and tries to excuse the omission by reference to *Saunders* v. *Shaw*, 244 U. S. 317. That case is not applicable on the facts herein.

Nothing is better settled in Federal jurisprudence than the principle that the jurisdiction of this Court depends on the existence of a right, title, privilege or immunity under the Federal Constitution or laws set up and denied in the state courts. This Court said in *Southwestern Bell Telephone Co.* v. *Oklahoma*, 303 U. S. 206, 212, 213:

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it."

To the same effect:

Durley v. *Mayo*, 351 U. S. 277, 281.
Stembridge v. *Georgia*, 343 U. S. 541, 547.
Honeyman v. *Hanan*, 300 U. S. 14, 18.

C. Petitioner's Real Grievance Is that the State Court Decided the Case Against It.

Apart from referring to the obvious proposition that the judicial acts of state courts are subject to the prescriptions of the Fourteenth Amendment (p. 7) the petitioner's entire argument is concerned with its claim that the Arbitrator applied the wrong rule of damages and that the lower courts should have corrected this claimed error of law (pp. 8-12). The same arguments were unsuccessfully urged below. It is not the function of this Court to review a claimed error of local law not involving a Federal question.

This Court wrote in *American Railway Express Company* v. *Kentucky*, 273 U. S. 269, 273:

> "It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law. Arrowsmith v. Harmoning, 118 U. S. 194, 195; Iowa Central Ry. Co. v. Iowa, 160 U. S. 389, 393; Tracy v. Ginzberg, 205 U. S. 170, 177; Bonner v. Gorman, 213 U. S. 86, 91; McDonald v. Oregon R.R. & Nav. Co., 233 U. S. 665, 669."

In *Patterson* v. *Colorado*, 205 U. S. 454, 461, this Court wrote:

> "But in general the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the Fourteenth Amendment merely because it is wrong or because earlier decisions are reversed."

In *McDonald* v. *Oregon Railroad & Navigation Co.*, 233 U. S. 665, 669, 670, this Court wrote:

> "It is elementary and needs no citation of authority to show that the due process clause of the Fourteenth Amendment does not control methods of state procedure or give jurisdiction to this court to review mere errors of law alleged to have been com-

mitted by a state court in the performance of its duties within the scope of its authority concerning matters non-Federal in character."

Petitioner argues that the effect of the breach of contract should have been determined by the law of India (p. 8). This argument was not available to it even in the state appellate courts because the appeal was limited to the question of damages (fol. 71). Even were the appeal not so limited, the decision of a state court as to whether it should apply a foreign law or its own is a question of local law which does not raise any Federal question and with which this Court will not concern itself. *Kryger* v. *Wilson*, 242 U. S. 171, 176; *Wells* v. *Simonds Abrasive Co.*, 345 U. S. 514, 516.

CONCLUSION

Since there is no Federal question and none was raised in the state courts, the petition should be denied.

Respectfully submitted,

ALFRED RATHHEIM,
Attorney for Respondent.

SIDNEY ABRAMS,
ALVIN L. KASSEL,
of Counsel.